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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-824

WINIFRED S. NANCE,
Petitioner,

vs.

UNION CARBIDE CORPORATION, CONSUMER PRODUCTS DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Winifred S. Nance, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 28, 1976, rehearing and rehearing *en banc* having been denied September 23, 1976.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals, reported at 540 F.2d 718, are reprinted in the Appendix *infra* at 1a-20a and 21a, respectively. The order of the Court of Appeals denying Petitioner's petition for rehearing is set out in the Appendix *infra* at 22a. The Findings of Fact and Conclusions of Law of the United States District Court for the Western District of North Carolina, reported at 397 F. Supp. 436, are set out in

the Appendix *infra* at 23a-72a. The judgment of the District Court, which is not reported, is set out in the Appendix *infra* at 73a-81a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1976. Petitioner's timely petition for rehearing and rehearing *en banc* was denied on September 23, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 23 of the Federal Rules of Civil Procedure can be applied as a matter of law to limit the remedial authority of the district courts under § 706(g) of Title VII to grant comprehensive "make whole" relief to an individual employee who has been found to be a victim of systemic and institutional employment discrimination but who has opted not to seek class certification under Rule 23?

2. Whether the Court of Appeals erred in its reliance upon matters contained in letters from the district court to counsel as the proper standard by which to review the claims of an individual employee challenging systemic and institutional employment discrimination?

STATUTORY PROVISIONS INVOLVED

Rules Enabling Act, 28 U.S.C. § 2072, *as amended*:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein,

> and the practice and procedure in proceedings for the review or enforcement of orders of administrative agencies, boards, commissions, and officers.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, provide:

> Sections 703(a)(1) and (a)(2) 42 U.S.C. § 2000e-2(a)(1) and 2(a)(2):
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> Section 706(b), 42 U.S.C. § 2000e-5(b):
>
> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticehip or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency,

labor organization, or joint labor-management committee (hereafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

Section 706(g), 42 U.S.C. § 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

FEDERAL RULES OF CIVIL PROCEDURE

The case involves the provisions of Rule 23, Federal Rules of Civil Procedure, fully set out in the Appendix *infra* at 82a-85a.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Western District of North Carolina on August 18, 1972 in which Petitioner, a female employee of the Respondent, alleged discrimination based on sex in employment as being in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Petitioner alleged that the Respondent had engaged in systemic and institutional practices of discrimination based on sex prior to the effective date of Title VII (July 2, 1965); that the effects of those practices were continuing into the post-Act period; and that she was a person aggrieved by these practices. Petitioner began her employment with Respondent on July 8, 1952.

The district court ordered Petitioner to file a statement on the class aspects of the case and on November 20, 1972, she filed the following statement:

> This action was not brought as a class action pursuant to Rule 23(a)(b)(2) of the Federal Rules of Civil Procedure, when the action was initially filed in Court on August 18, 1972. [Petitioner] does not contemplate at this time seeking to amend the Complaint to allege a class action, however, [Petitioner] is of the opinion that whatever benefits she may obtain in this action should inure to the benefit of other similarly situated females of the [Respondent] in the Mecklenburg County facilities of the [Respondent].

However, Petitioner filed her action as an individual action and at no time sought class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Respondent, relying upon the charges Petitioner filed with the Equal Employment Opportunity (EEOC), challenged the standing of Petitioner to seek relief from across-the-board sex based employment practices and

moved the court to restrict Petitioner's action to the narrow question relating to the correctness of her seniority date. The district court rejected this challenge after reviewing the complete files from the District Office of the EEOC. (64a-66a) The court found that Petitioner's claims of sex based discrimination in "promotions, job classifications, and terms and conditions of employment" were fully advanced before the EEOC and were considered or should have been considered by the EEOC [1] prior to its issuance of notice of her right to seek relief in the district court. (65a; 66a)

The trial began on March 12, 1974 and was adjourned after eight days. Shortly after the adjournment, the district judge sent several letters to counsel requesting the submission of proposed findings of fact to help

[1] Petitioner filed a number of charges with the EEOC between March 30, 1970 and February 25, 1971. In a February 25, 1971 charge, which was the principal charge relied upon by the district court to decide whether Petitioner had standing to raise broad based claims of employment discrimination (64a), Petitioner alleged:

> "I and other females allege discrimination in terms and conditions of our employment because of sex in that,
>
> 1. Jobs are being changed so that they can be classified as male jobs.
>
> 2. Males are recalled with less seniority in preference to females with more seniority.
>
> 3. Females are denied an opportunity to use company service date at times of lay-off.
>
> 4. Males have job rights and department rights over women.
>
> 5. Males are allowed to quit and return and gain company service while females are denied.
>
> 6. Rules are being changed to deny females and favor males.
>
> 7. Females are told if they accept a heavy job and cannot perform, they will be discharged.
>
> 8. Routine inspection test does not pertain to the job and never given the results of the test."

"sharpen the issues" as an aid to the court in arriving at an "orderly final decision." [2]

More than seven months after these letters, the trial was resumed and concluded on December 11, 1974. Thereafter, on April 28, 1975 the district court entered comprehensive and detailed Rule 52(a) findings of fact. The

[2] On April 1, 1974, the district judge sent the following letter:

> Gentlemen:
>
> I have not yet been able to set a time to complete the taking of evidence. It has occurred to me that we might save some wheel spinning if we do a little skull work before the resumption of hostilities.
>
> With this in mind, and to sharpen the issues so that I can tell what I am trying to decide, I shall be grateful if you gentlemen will do the following:
>
> Plaintiffs are requested to draft proposed findings of fact in brief form, including a simple statement of the facts on the basis of which plaintiffs say that Mrs. Nance and others lost seniority before 1967 because of sex. In other words, what were the events which produced a loss of seniority and what amount of seniority was thereby lost and why was it discriminatory? Plaintiffs are further requested to indicate what methods may be possible to remedy any residual effects of such loss of seniority, if the court finds such loss to have occurred.
>
> Defendants are requested to prepare proposed findings of fact in favor of the defendants on all of the separate issues that were raised at trial which do not have to do with the single issue of loss of seniority.
>
> If you will prepare and file this information by April 15th or thereabout, I shall be grateful. It will help in winding up the remaining testimony, and also in trying to arrive at an orderly final decision.

On April 18, 1974, the district court sent the following letter:

> Dear Mr. Ogletree:
>
> * * * *
>
> My April 1, 1974 letter may have been too broad in the last paragraph on Page 1. Although I do not remember the testimony very well, it seems to me there is probably evidence which would suggest a change in past or in existing practices about posting or not posting notices of vacancies and available promotions. Perhaps I should therefore have asked plaintiffs' counsel to draft something on that subject, but I shall be glad for you to tender something on that point also.

district court found that Petitioner had been a victim of comprehensive and systemic sex based discriminatory employment practices.[3] (23a-64a) The practices found to be unlawful included the seniority system (28a-33a); lay-off and recall procedures (41a-43a); testing practices (43a-46a); supervisory selection procedures (48a-49a); and a disguised form of sex stereotyped job classifications (34a-39a; 54a). None of these practices were held to be supported or required by business necessity (57a) nor protected under the bona fide occupation qualification exception provided in § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e). (57a-58a)

In October, 1975, the district court entered a comprehensive judgment (73a-81a) under its authority in § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). The district court deemed the judgment necessary "to remedy the present and continuing discrimination based on sex and to remedy the competitive seniority disadvantage to [Petitioner] stemming from the [Respondent's] practices of maintaining segregated jobs and rosters, and promotions, transfers, lay-offs and recall procedures based on sex." (58a-60a) Specific relief in the nature of back pay was awarded only to Petitioner. (79a)

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[3] For example: The district court found that from 1956 until November 18, 1969—more than four years after the effective date of Title VII—Respondent maintained an open and declared policy and practice of segregating its work force based on sex. (29a) The first female foreman at the Respondent's Charlotte plant was not selected until shortly after the complaint was filed (48a); and the court found that supervisory selection procedures were based on "purely subjective standards [with] no safeguards in these procedures designed to avert discrimination against females." (49a) Femarles were not allowed to take tests used by the Respondent at least since 1952 for certain jobs designated male jobs until five years after the effective date of Title VII; even then the court found that these "old tests" had a disparate impact on females and were not job related. (43a-46a) New tests were instituted in 1971, but the court found these "new tests" invalid under decisions of this Court and the EEOC guidelines. (54a; 59a)

On Respondent's appeal, the Court of Appeals vacated the judgment of the district court and limited Petitioner's relief to only a consideration of an adjustment of her seniority date and the recognition of her right to back pay, costs and attorneys' fees. (1a-20a) The Court of Appeals held as a matter of law that a federal court is without authority to award comprehensive injunctive relief to an individual found to be a victim of discrimination prohibited by Title VII unless the action has been properly certified as a class action under Rule 23 of the Federal Rules of Civil Procedure. (2a-9a) In reliance upon several letters[4] that the district judge sent to counsel requesting proposed findings prior to the entry of Rule 52(a) findings the court below held also that certain of Petitioner's allegations made in her EEOC charges were not entitled to plenary consideration. The Rule 52(a) findings of broad based sex discriminatory practices of the Respondent other than Petitioner's seniority status were "briefly discussed" by the court below only because the parties had "devoted some parts of their argument" to them. (9a-10a) Petitioner's petition for rehearing and rehearing *en banc* was denied on Sep-

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[4] These letters are set out at n. 2, *supra*. In refusing to accord plenary treatment to all of Petitioner's claims, the court of appeals held:

> . . . It must be assumed from [the district judge's letter of April 1, 1976] that the trial judge found that, so far as her individual claim was concerned, the [Petitioner] was only "aggrieved" by her loss of seniority status, and he intended to limit her relief to this single specific claim of discrimination. The testimony at trial, it is true, had churned up some other issues not concerned with broad, continuing sex discrimination on [Respondent's] part, but issues involving practices long since abandoned by the [Respondent]. These additional issues, the trial court seemingly regarded as wanting in substance, according to his joint letter to counsel to which we have previously referred. Since, however, both parties have devoted some parts of their argument to these other issues, we shall briefly discuss them.

(10a).

tember 23, 1976 except for correction of a factual mistake. (22a)

REASONS FOR GRANTING THE WRIT

I

The Petition Presents An Important Question of Federal Law Concerning the Relationship Between the Class Action Procedures Under Rule 23 of the Federal Rules of Civil Procedure and the Remedial Authority of Federal Courts Under Section 706(g) of Title VII

The critical issues of employment discrimination law at present involve remedies. This Court has decided several significant Title VII cases over the past several Terms involving the scope of the remedial authority of the federal courts under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). These cases were race discrimination cases that had been certified as class actions under Rule 23 of the Federal Rules of Civil Procedure. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). This case brings before the Court an important question of federal law involving the authority of the federal courts to award "make whole" injunctive relief to an individual plaintiff who has been found to be a victim of past and continuing systemic employment discrimination but who has opted not to pursue the action as a class action under Rule 23. That question is: Upon a finding of systemic and institutional employment discrimination as the findings of the district court herein so clearly demonstrate, is an individual who has been found to be a victim of that discrimination entitled to injunctive relief under § 706(g) of Title VII that affirmatively disestablishes that system, even though the action is not brought as a class action under Rule 23 and even though the disestablishment of the offending system would also operate, of necessity, in favor of other similarly situated persons?

The decision of the Court of Appeals interposes a general prohibtion on the authority of federal courts to award comprehensive and necessary relief to individual victims of employment discrimination. The court found a barrier neither in the statutory language nor the legislative history of Title VII nor in the findings of fact made by the district court, but in the provisions of Rule 23 of the Federal Rules of Civil Procedure. If the decision is correct, no federal court would have the authority to grant effective relief from systemic and institutional employment discrimination to an individual victim unless the case is certified as a class action [5] or brought as a "pattern and practices" case by the EEOC.[6]

The principle announced below is inconsistent with the remedial purposes of Title VII and with the construction of § 706(g) of the Act established by this Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) and *Albemarle Paper Co.*, 422 U.S. 405 (1975). The decision below also abridges Petitioner's substantive rights under Title VII in contravention of the Rules Enabling Act, 28 U.S.C. § 2072, *as amended.*

This Court has emphatically confirmed the Congressional mandate in § 706(g) that gives federal courts plenary remedial power to make victims of unlawful discrimination whole because the attainment of this objective requires that persons aggrieved by the consequences of the unlawful employment practice be, so far

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[5] Efforts to obtain class certification under Rule 23 can add troublesome roadblocks to persons already aggrieved by employment discrimination as is illustrated in the Fourth Circuit's opinion in *Doctor* v. *Seaboard Coast Line R. Co.*, 540 F.2d 699, 704-710 (4th Cir. 1976); *see also Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1973).

[6] § 707, 42 U.S.C. § 2000e-6; *see Detroit Edison Co. v. EEOC*, 515 F.2d 301, 310-312 (6th Cir. 1975), *pet. for cert. pending*, 44 U.S.L.W. 3150, 3214 (U.S. August 14, 1975) (No. 75-393) (EEOC not subject to class action rules under Rule 23).

as possible, restored to a position where they would have been were it not for the unlawful discrimination. Thus this Court has established a remedial standard that effective relief in Title VII cases can be denied "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Franks* v. *Bowman Transportation Co., supra* at 771; *Albemarle Paper Co. v. Moody, supra* at 421.

The construction of 706(g) established by this Court is premised on Congressional recognition that unlawful systemic and institutional employment discrimination requires substantial modification or abolition of all of the systemic features that create or perpetuate these practices because,

> Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-Act discrimination through various institutional devices, and testing and validation requirements.

Franks v. *Bowman Transportation Co., supra* at 764 n. 21, *citing*, S. Rep. No. 92-415, p. 5.

The Court of Appeals did not disturb the ultimate finding[7] of the district court that Respondent had engaged in discrimination made unlawful under § 703(a) of Title VII thus requiring a grant of relief under § 706 (g). Nevertheless, the Court of Appeals denied complete relief on the basis that comprehensive and systemic relief is available only upon a showing that an individual plaintiff has sought and was granted class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. (4a-9a)

The Court of Appeals' theory of borrowing Rule 23 to limit the authority of the district courts is incompatible not only with the obligation of the federal courts under § 706(g) as construed by this Court in *Franks, supra* and *Moody, supra*, but that theory abridges Petitioner's substantive rights under Title VII in contravention of the Enabling Act, 28 U.S.C. § 2072, *as amended*, in 1966. The Enabling Act of 1934 gives this Court the authority to prescribe the Federal Rules of Civil Procedure. An important proviso in the Enabling Act is that the rules so prescribed "shall not abridge, enlarge, nor modify substantive rights" in the guise of regulating procedure. 28 U.S.C. § 2072; *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 556 (1974); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 11 (1941). The principal purpose of Rule 23 is to provide a procedure for efficient and economical litigation designed to avoid multiplicity of activity where class action designation is found to be superior to other methods for the fair and efficient ad-

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[7] The Court of Appeals ruled that,

> It is conceded by the [Respondent] that in the pre-Act period, the jobs in certain departments were reserved exclusively for male employees and that in periods of layoff only qualified male employees could bid on the jobs in these departments. Such a system obviously gave the male employee a preferred opportunity to protect his 'company service' over the female employee. This more extensive opportunity in bidding for vacancies during layoffs on part of male employees was a discrimination against female employees, and because that discrimination was carried over in the operation of the post-Act system. To such extent as the [Petitioner] was prejudiced thereby in the computation of her, company service, or seniority rights, she is entitled to relief.

(18a) See *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944); *East* v. *Romine, Inc.*, 518 F.2d 332, 338-339 (5th Cir. 1975) on distinction between "ultimate fact" and "subsidiary fact" for purposes of appellate review.

judication of the controversy. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 551, 553 (1974).

Rule 23 is a procedural device of judicial administration. The relief to be awarded in any Title VII case—class action or individual—is substantive rather than administrative. Thus the decision of the court below holding that Rule 23 limits the remedial authority of federal courts provided in § 706 of Title VII is reminiscent of the days when the substantive rights of parties were decided on the basis of procedural technicalities. See Rule 7(c) of the Federal Rules of Civil Procedure; 5 Wright & Miller, *Federal Practice and Procedure* § 1181 (1969).

II

The Decision Below Conflicts With Decisions Of Other Courts of Appeals on the Same Matter

The decision below holding that Rule 23 limits the authority of the federal court to grant systemic relief to individual victims of employment discrimination conflicts with decisions of other courts. In *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974), the Fifth Circuit held that a single employee found to have suffered from a violation of Title VII is entitled to "make whole" relief requiring the abolition of the offending discriminatory system even if a district court, under correct standards, decides that class certification under Rule 23 is inappropriate:

> . . . Carey also seeks to have provisions of the collective bargaining agreement declared discriminatory and defendant enjoined from applying them. If the class action is allowed, this question becomes moot. If class action is denied, plaintiff's point would be well taken, and he should be afforded abolition of the system—not just the prevention of its applicability to him.

500 F.2d at 1381.

In *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the Seventh Circuit held that, Rule 23 notwithstanding, § 706 (g) of Title VII grants federal courts plenary power to enter a judgment in an action brought as an individual action that affords class wide relief to other similarly situated employees. 444 F.2d at 1201-1202. *Sprogis* is bottomed on the recognition that Title VII protects important substantive rights and that a Title VII suit is necessarily a class action as the evil sought to be remedied is discrimination on the basis of class characteristics, *e.g.*, sex. The Seventh Circuit accorded the necessary recognition to the fact that federal courts have a special responsibility in the public interest to devise remedies which effecutate the policies of Title VII as well as to afford private relief to the individual employee instituting the complaint.

In *Tipler* v. *E.I. duPont de Nemours Co.*, 443 F.2d 125 (6th Cir. 1971), the Sixth Circuit held that although a Title VII action is not labeled a class action, it is perforce a sort of class action for fellow employees similarly situation. Thus the Sixth Circuit held that if an individual plaintiff is successful in establishing a violation of the Act, the relief would inure to the benefit of fellow employees by providing relief against a wide range of past and present discriminatory employment practices. 443 F.2d at 130.

The conflict between the circuit courts is not limited to Title VII cases. In an analogous line of cases, courts have denied class certification on the ground that in cases in which injunctive relief is sought, such relief to the extent granted, will inure to the benefit of others similarly situated. The ruling in these cases is based upon the notion that no useful purpose would be served by certifying the action as a class action because the legality or non-legality of the challenged rules and regulations

can be determined to be constitutional or unconstitutional regardless of whether the action is treated as an individual action or as a class action. *Craft* v. *Memphis Light, Gas and Water Division*, 534 F.2d 684, 686 (6th Cir. 1976); *Ihrke* v. *Northern States Power Co.*, 459 F. 566, 572 (8th Cir.), *vacated and remanded to dismiss as moot*, 409 U.S. 815 (1972); *Carter* v. *Butz*, 479 F.2d 1084, 1089 (3rd Cir.), *cert. denied*, 414 U.S. 1094, 1103 (1973); *Martinez* v. *Richardson*, 472 F.2d 1121, 1126-27 (10th Cir. 1973).

The conflict between the circuits on whether Rule 23 limits the remedial authority of the federal court is not likely to be resolved by future cases in the courts of appeals. For example, in a case decided prior to *Carey* v. *Greyhound Bus Co., Inc., supra*, the Fifth Circuit held in a Title VII sex discrimination case that Rule 23 prohibits a court from entering relief in an individual case that inures to other similarly situated females unless the action is a certified Rule 23 class action. *Danner* v. *Phillips Petroleum Co.*, 447 F.2d 159, 164 (5th Cir. 1971). But in a case decided subsequent to *Carey, supra*, the Fifth Circuit held in a plaintiff-prisoner case that Rule 23 prohibits a court from granting injunctive relief that requires a state to provide access to legal materials unless a class action is pleaded in the complaint. *Wilson* v. *Zarhadnick*, 534 F.2d 55 (5th Cir. 1976). Similarly, the Fourth Circuit affirmed without opinion a decision of a lower court which had denied class action certification on the ground that the injunctive relief would inure to the benefit of others similarly situated even absent Rule 23 class certification. *Mohr* v. *Jordan*, 370 F. Supp. 1149, 1151 n. 3 (D. Md. 1974), *aff'd.* (No. 74-1496, 4th Cir., filed July 31, 1974). However, in the instant case, the Fourth Circuit ruled that an individual plaintiff is not entitled to broad injunctive relief unless class certification is granted.

The conflict among the circuits on this question justifies the grant of certiorari to review the judgment below.

III

The Decision Below Represents A Legally Insupportable Departure From the Doctrine of Standing

The Court of Appeals summarily rejected practically all of Petitioner's claims of employment discrimination for two reasons. First, the court failed to apply the appropriate standing test to the allegations made by Petitioner in charges that she had filed with the EEOC. Secondly, the court focused upon a letter, see n. 2, *supra*, that the district judge sent to counsel—rather than the charges Petitioner had filed with the EEOC—as the basis upon which to determine what claims of Petitioner were entitled to plenary judicial consideration. (9a-10a) The decision below thus raises important constitutional, statutory and policy considerations growing out of the bona fide efforts of "laymen, unassisted by trained lawyers," [8] to invoke the jurisdiction of the federal courts to seek vindication of their rights under Title VII.

1. *The Appropriate Standing Test*: A person claiming to be aggrieved by a violation of Title VII may not invoke the jurisdiction of a federal court until he has first unsuccessfully pursued certain avenues of potential administrative relief which must be initiated with the filing of a charge with the EEOC. § 706, 42 U.S.C. § 2000e-5; *Love* v. *Pullman Co.*, 404 U.S. 522 (1971). The courts have thus adopted a rule that a complaint filed in the federal courts under Title VII may allege and raise issues of employment discrimination "like or related" to the claims contained in the charge filed with the EEOC and/or growing out of such allegation during

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[8] *See Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1971); *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969).

the pendency of the charge before the EEOC. *E.g.*, *Gamble* v. *Birmingham Southern R.R. Co.*, 514 F.2d 678, 689 (5th Cir. 1975); *Graniteville Co.* (*Sibley Division*) v. *EEOC*, 438 F.2d 32, 38 (4th Cir. 1971); *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970). The "like and related" doctrine is thus rooted in traditional notions of standing.

The law of standing has two aspects. As a constitutional doctrine, founded in the restrictions imposed on the judicial power by Article III of the Constitution, the standing rules impart justiciability: whether the plaintiff has made out a "case or controversy" within the meaning of Article III. *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975) In sum, when plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability, the plaintiff has shown injury to himself that is likely to be redressed by a favorable decision, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 96 S.Ct. 1917, 1925, 1926 (1976) or "injury in fact." *Ass'n. of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970). In addition to its constitutionally based requirement, the standing doctrine incorporates a prudential limitation on the judicial power by demanding that the interest of the plaintiff, regardless of its nature in the absolute, at least be arguably within the zone of interests to be protected or regulated by the statutory framework within which his claim arises. *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra* at 1924; *Ass'n. of Data Processing Service Organizations, Inc.* v. *Camp*, 317 U.S. at 153.

In some statutory schemes, Congress has itself determined that standing should be granted to anyone who satisfies the constitutional requirements. *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237 (1969); *cf. Franks* v. *Bowman Transportation Co.*, *supra* at 752-757. Title

VII is such a statute. The use in § 706(b), 42 U.S.C. § 2000e-5(b) of the language "a person claiming to be aggrieved" shows a Congressional intention to define standing as broadly as is permitted by Article III of the Constitution. *Gray* v. *Greyhound Lines, East*, No. 75-1631 (U.S.D.C. App., October 13, 1976), 12 EPD ¶ 11,211; *Hackett* v. *McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3rd Cir. 1971); *Waters* v. *Heublein, Inc.*, —— F.2d —— (7th Cir., November 12, 1976), 45 U.S.L.W. 2260. *See also Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) citing with approval *Hackett* v. *McGuire Bros., Inc., supra.* Petitioner made claims that she is a person aggrieved within the meaning of § 706 (b) and the allegations that she made in her charges filed with the EEOC and in her complaint filed in the district court were broad based claims of systemic, across-the-board allegations of sex discrimination which the district court found caused her "injury in fact". See n. 3 *supra.* The allegations asserted by the Petitioner in her charges are interests clearly within the scope of Title VII's protection against sex discrimination in "terms, conditions, or privileges of employment." § 703 (a)(2), 42 U.S.C. § 2000e-2(a)(2). Indeed, if such maters as supervisory selection procedures, weight lifting limitations, posting of job notices, assignment of work, etc., were not considered "terms, conditions or privileges of employment," it would be difficult to give that language any meaning at all. *Gray* v. *Greyhound Lines, East*, *supra* at 5582. In *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the court held that the language in § 703 of Title VII, 42 U.S.C. § 2000e-2

> . . . evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameters of such nefarious activities. Rather, it

pursued the path of wisdom by being unconstrictive, knowing that constant change in the order of the day and that seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. *But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subleties of discriminatory employment practices are no longer confined to bread and butter issues.* (emphasis supplied)

The standard adopted by the court below to determine Petitioner's standing was not the substantive "like and related" constitutionally based standard but rather a standard apparently fashioned for this case and premised upon a procedural trial practice of the district court in requesting counsel to submit proposed finding designed to facilitate a final disposition. The standard adopted by the court below is no standard at all when measured against well established principles of standing. The decision, if allowed to stand, will have a severe adverse impact not only upon the efforts of individual plaintiffs claiming to be aggrieved, *cf. Doctor* v. *Seaboard Coast Line R. Co.*, 540 F.2d 641 (4th Cir. 1976), but also upon the effectiveness of the EEOC to carrying out its mandate under Title VII.[9]

2. *Reliance Upon Letter to Counsel*: Finally, the procedure used by the court below to test the sufficiency of the decision made by the district court is open to serious question. The record shows clearly that the district

[9] The comptroller general has issued a report showing that as of June 30, 1975, the EEOC had a backlog of charges that totaled 123,340, some of which dated back to fiscal year 1968. Comptroller General: *Report to the Congress: The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination*, at 9 (1976).

court carefully reviewed the charges filed by the Petitioner with the EEOC and found not only that all of the claims were properly before the EEOC (64a-66a) but also that Petitioner was a victim of all of these claims. The refusal of the court below to respect those facts and those findings and the action of the Fourth Circuit reviewing the record *de novo* and in making its own findings as to the discrimination to which Petitioner was and was not subject cannot be justified. It is a well established rule that an appellate court cannot refer to extraneous matters or opinions for the purpose of impeaching Rule 52(a) findings.[10] *American Propeller & Mfg. Co.* v. *United States*, 300 U.S. 475, 479 and n. 2 (1937); *Wells Benz, Inc.* v. *United States*, 333 F.2d 89, 93-94 (9th Cir. 1964); *United States* v. *Forness*, 125 F.2d 928, 942 (2nd Cir.), *cert. denied*, 316 U.S. 694 (1942).

[10] . . . it is well settled that an appellate court may not refer to a memorandum opinion for the purpose of impeaching findings . . . . and the same rule, in our estimation applies with particular force to oral observations and comments. 'Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.'

Wells Benz, Inc. v. *United States*, 333 F.2d 89, 94 (9th Cir. 1964) (citations omitted.)

CONCLUSION

The Court should grant a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NANCE

v.

UNION CARBIDE CORP.

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges

Decided July 28, 1976

RUSSELL, CIRCUIT JUDGE:

This appeal arises out of an action charging sex discrimination in employment rights under Title VII. After trial, the District Court granted both individual and broad class relief. The defendant has appealed. We modify the decree and remand for entry of decree as hereinafter indicated.

The plaintiff is a female employee at the Charlotte, North Carolina battery plant of the defendant. Her employment began in 1952 and has been continuous since, save for layoffs. Following a layoff in January, 1970, she filed with the Equal Employment Opportunity Commission [1] over a period of some eleven months a succession of five charges alleging sex discrimination. All

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[1] Hereafter referred to as EEOC.

arose basically out of her layoff. Following receipt from the EEOC of a "suit letter," this judicial action was begun, and after trial, resulted in the judgment from which this appeal is taken.[1a]

A preliminary issue, earnestly pressed by the defendant and briefed by both parties, is whether this action is to be treated as a class action or as an individual action. Concededly it was brought as an individual action.[2] This individual character of the action was not merely affirmed in the complaint as filed, it was so stipulated categorically in the record by the plaintiff herself at an early stage of the proceedings. This stipulation resulted from a motion by the defendant for a more definite statement by the plaintiff, setting forth the persons or class, if any, the plaintiff sought to represent. By this motion the defendant manifestly sought to establish definitely and finally whether the plaintiff intended to make any claim that her action was a class action. The motion was denied by the Court on the express condition "that the plaintiff [would] plead or file stipulations with regard to the class action aspects of the case, indicating more specifically the make-up of the class and the identity of the plaintiffs." By way of answer to such order, the plaintiff filed of record a stipulation to the effect that she did "not contemplate at this time seeking to amend the complaint to allege a class action, however, the plaintiff is of the opinion that whatever benefits she may obtain in this action should inure to the benefit of other similar situated females" at the Charlotte plant.[3]

[1a] 397 F. Supp. 436.

[2] *See Katz* v. *Carte Blanche Corporation* (3d Cir. 1974) 496 F. 2d 747, 760, *cert. denied* 419 U.S. 885 (1974):

> "* * * *the plaintiff, not the judicial system,* controls whether or not to ask for class action treatment." (Emphasis added)

[3] The latter part of this statement represents, as we understand it, an expression of plaintiff's counsel's opinion that any legal issue

At no time after the entry of this stipulation did the plaintiff seek to convert her individual action into a class action; she made no motion to amend her complaint to state a class action; she at no point endeavored to declare "specifically the make-up of the class and the identity of the plaintiffs" she would represent as a class representative; in sum, she did nothing thereafter to comply with or satisfy the requirements for both alleging and establishing a right to proceed as a class action under Rule 23. Moreover, in a formal order, entered on January 24, 1974, on the eve of the commencement of trial in March of that year, and some eighteen months after this action was commenced, the District Court sustained the plaintiff's objections to certain interrogatories submitted by the defendant because of, as the Court put it, "representations of Plaintiff's counsel that this suit was brought and remains an individual action and not a class action and that back pay is not sought for, and cannot extend as a result of this suit to anyone other than the named plaintiff." [4] Nor did the District Court ever hold a hearing on class certification under Rule 23 or enter an order of class certification or set forth any definition of class or classes of which plaintiff was declared a representative or make any provision for notice to any identified class, all as contemplated under

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decided favorably to the plaintiff in this suit against the defendant may be availed of by way of collateral estoppel in any individual suit instituted or tried subsequently by one asserting the same seniority claim as the plaintiff against the defendant. *Katz* v. *Carte Blanche Corporation, supra,* at 762; *Bradford* v. *Peoples Natural Gas Company* (W.D.Pa. 1973) 60 F.R.D. 432, 435.

[4] This order creates another difficulty in possibly considering this as a class action. Such order, entered on the eve of trial and circumscribing defendant's right of discovery on the assumption the action was purely an individual one, would put the defendant at a likely disadvantage at trial, if thereafter, without notice to the defendant, the action were converted into a class action. Such possible prejudice under such circumstances to the defendant would make treatment of the action as a class action inequitable.

Rule 23. The issue thus is whether, in these circumstances, and in the face of two express "representations" by the plaintiff to the Court that her action was strictly an individual action, and in the absence of any order of any class certification by the Court itself, this action can fairly be declared a class action in compliance with Rule 23.

Despite the fact that Title VII actions often are described as "inherently class suits" and that the requirements of Rule 23 "must be read liberally in the context of suits brought under Title VII and Section 1981," [5] the plaintiff in such an action, in order to establish the right to proceed as a class representative, "must [like any other plaintiff] establish that the action meets the requirements of Rule 23(a);" employee discrimination suits do not represent exemptions from the terms of such Rule.[6] Rule 23 contemplates that every plaintiff, in order to qualify for class treatment thereunder, will seek "class relief * * * in the complaint," [7] and in the absence of such an allegation, class treatment is generally considered inappropriate. An express ruling to this effect was made in *Danner* v. *Phillips Petroleum Co.* (5th Cir. 1971) 447 F. 2d 159, a case very similar in its facts to the one under review here. In *Danner*, the plaintiff, a female, contended that, under the defendant's seniority practices, female employees were discriminated against in favor of male employees and that, as a result of such discriminatory seniority system, she had

[5] *Rodriguez* v. *East Texas Motor Freight* (5th Cir. 1974) 505 F. 2d 40, at 50 (U.S.Appeal Pending).

[6] *Ibid.; Senter* v. *General Motors Corp.* (6th Cir. 1976) 532 F. 2d 511, 520; *Oatis* v. *Crown Zellerbach Corp.* (5th Cir. 1968) 398 F. 2d 496, 499; *Pointer* v. *Sampson* (D.C.D. 1974) 62 F.R.D. 689, 696; *Kinsey* v. *Legg, Mason & Company, Inc.* (D.C.D. 1973) 60 F.R.D. 91, 99.

[7] *Rodriguez* v. *East Texas Motor Freight, supra*, 505 F. 2d at 50.

been laid off in violation of the terms of Title VII. She, as has the plaintiff here, filed her action under Title VII as an individual action. In holding "that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23," [8] the Court said, at p. 164:

> "* * * none of the Rule 23 prerequisites have been satisfied. Mrs. Danner sued as an individual plaintiff; she established a prima facie case of sex discrimination against herself by proving that she had been discharged in a plant economy move because she possessed no seniority or bidding rights, and that no women in the plant had such rights. She showed further that the work she was doing was substantially similar to the work of men in the plant who had seniority and bidding rights, and that she was replaced by men who possessed those rights. Mrs. Danner, however, never took up the banner of women's liberation for all the female employees in the Phillips plant. This, of course, does not mean that female employees of Phillips may not take advantage of Mrs. Danner's judicial victory in the future, or, indeed, that they may not join together in a class action against Phillips if they feel one is justified. But if they decide to bring a class action, it must be brought and identified as such, and the predicate for class action relief must be carefully laid. In the meantime, Mrs. Danner's victory is for her alone to taste and enjoy."

A similar result was reached in *Washington* v. *Safeway Corporation* (10th Cir. 1972) 467 F. 2d 945, 947, and by us in *Carracter* v. *Morgan* (4th Cir. 1973) 491 F. 2d 458, 459. In fact, in the latter case, the plaintiffs had indicated in their complaint that they were suing both individually and as representatives of a class but, in the absence of any certification or identification

[8] 447 F. 2d at 164, n. 10.

of the class before a decision on the merits,[9] it was held that class treatment was inappropriate, the Court stating:

> "Because of plaintiffs' failure to bring to the attention of the trial court, at any time, the matter of the determination of whether the action would be maintained as a class action, and also because of lack of notice to any class of the proposed final order, we are of opinion that the district court was correct in its actions and the opinion below ought to be affirmed. No determination was ever made at any time that the action be maintained as a class action. F.R.Civ.P. 23(c)(1). No notice was ever given. F.R.Civ.P. 23(e)."[10]

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[9] The language of Rule 23(c) makes it quite clear that the determination of class status is to be made "before the decision on the merits." *See Peritz* v. *Liberty Loan Corporation* (7th Cir. 1975) 523 F. 2d 349, 354; *cf. Indianapolis School Comm'rs* v. *Jacobs* (1975) 420 U.S. 128, and *Jimenez* v. *Weinberger* (7th Cir. 1975) 523 F. 2d 689, U.S. Appeal Pending.

[10] The reasoning in *Carracter* is confirmed substantially, it would seem, by the later decision in *Indianapolis School Comm'rs.* v. *Jacobs* (1975) 420 U.S. 128. In that case the action was clearly declared a class action in the complaint but no order was entered certifying it as a class action. The plaintiff prevailed both in the District Court and in the Court of Appeals as if on a class action but, during oral argument in the Supreme Court, it developed that the action was moot as to the individual plaintiff. Since, in the absence of actual certification as a class action, the action remained, in the opinion of the Court, but an individual action, the mootness of the individual claim rendered the case subject to dismissal. The Supreme Court accordingly vacated the judgment, stating at p. 130:

> "* * * Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint."

In *Franks* v. *Bowman Transportation Company, Inc.* (1976) —— U.S. ——, 44 LW 4356, slip opinion p. 5, n.6, the Court explained the ruling in *Jacobs*, decided a few weeks ago, thus:

> "In *Board of School Commissioners* v. *Jacobs*, *supra*, the named plaintiffs no longer possessed a personal stake in the outcome at the time the case reached this Court for review. As the action had not been properly certified as a class action by the District Court, we held it moot."

Nor do *Senter* v. *General Motors Corp.*, *supra*, and *Bing* v. *Roadway Express, Inc.* (5th Cir. 1973) 485 F. 2d 441, relied on by the plaintiff in support of the class relief granted herein by the District Court, support her contention. In *Senter*, the Court at the outset emphasized that there was "no question but that the suit [involved there] was filed as a class action and it proceeded to trial as a class action" and then added that "Appellant [had] identified the suit as a class action in his opening remarks at trial and Appellee [had] responded by freely admitting that the suit had been filed as a class action." In that context, where, as the Court went on to comment, "all the parties [had] proceeded on the assumption that the action was a class action," the Court concluded, citing *Bing* v. *Roadway Express, Inc.* (5th Cir. 1973) 485 F. 2d 441, 446-47, that the action was not improperly treated as a class action.[11] *Bing*, in its pertinent facts and ruling, was not substantially different from *Senter*. In *Bing*, "[i]t was apparent, the Court said, "from the beginning that Bing intended his suit to be a class action;" he had clearly *proclaimed it as such in his complaint;* and, "all parties to the action knew [throughout trial] of its class nature and acquiesced in it."[12] These factual differences—the treatment as a class action from the filing of the complaint throughout the proceedings with the knowledge and "acquiescence" of all parties—were the circumstances which distinguished *Bing* and *Senter* from *Danner*.[13] They are similarly distinguishable from this case.

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[11] 522 F. 2d at 521-22.

[12] 485 F. 2d at 446.

[13] The distinction between *Bing* and *Danner* was restated in the subsequent case of *Rodriquez* v. *East Texas Motor Freight*, *supra*, where Judge Wisdom, after stating that, "[w]hen class relief is

The plaintiff contends, however, that because she filed broad interrogatories that could be construed as relevant to a class action, the defendant was given proper notice that the plaintiff intended to proceed as a class action, and that, though no motion for certification was ever made or an order granting certification entered, the defendant was put on notice that plaintiff was proceeding by way of a class action. To accept such an argument would make a nullity of Rule 23 and the procedure it mandates. Moreover, the plaintiff had stipulated and entered representations on the record, not once but twice, as we have already said, that she was not proceeding by way of a class action. She had unequivocally declared in such record that if she intended her action to be a class action, she would amend her complaint to evidence such intention.[14] She at no time made such motion to amend. Entitled to rely on the plaintiff's positive disclaimers of any intention to proceed by way of a class action—disclaimers appearing in formal representations to the Court—the defendant was not obligated to read every interrogatory filed by the plaintiff to determine whether it indicated an unexpressed but implied intention on the part of the plaintiff to disavow her previous disclaimers and to assert a right to proceed as a class action. Furthermore, we do not perceive in the interrogatories any unmistakable sign or notice that the plaintiff contemplated a class action.[15] And this is particularly so, since, even on the eve of trial, the plaintiff was rep-

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sought in the complaint, * * * the court should liberally apply the requirements of Rule 23(a)," explained *Danner* as holding " 'that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23.' " 505 F. 2d at 50 and n. 11.

[14] The prerogative of designating the action as a class action rested entirely with the plaintiff, *see* note 2.

[15] Those interrogatories had at least some peripheral connection with the plaintiff's individual charges.

resenting unequivocally to the Court, in opposition to defendant's interrogatories, that she was not prosecuting a class action and was not seeking class relief, and the District Court, in reliance on that representation, had entered its order of January 24, 1974, denying in part defendant's right to answers to its interrogatories. Even if it could be thought that plaintiff's interrogatories gave some implied notice that she sought class relief, that implication would have been nullified by the representation made to the trial court, as stated in the order of January 24.

On this record, then, we find no warrant for treating this case as anything more than what the plaintiff herself has designated it, to wit, an individual action, limited as it is to plaintiff's individual claim or claims. It is perhaps not too much to add that, by failing to amend her complaint to seek class relief, and by failing to take any steps either in her pleadings or in positions taken during trial, to comply with Rule 23, and by her several representations to the trial court, the plaintiff herself has "precluded any class certification in this case." [16]

The real issue in this case is accordingly the validity of plaintiff's individual claim. In that connection, it should be noted that the plaintiff's claim revolves basically around her "company service" status, the computation of which resulted, she alleged, in her layoff in 1970. It was this layoff that precipitated her initial complaint to the EEOC, and it was this layoff which was the sole claim stated by the plaintiff in the first four charges she filed with the EEOC—as a matter of fact, it was not until some eleven months after the filing of her initial charge that she raised any other claim or claims. Nor was the trial judge apparently impressed at trial with

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[16] *Peritz* v. *Liberty Loan Corporation* (7th Cir. 1975) 523 F. 2d 349 at 354.

these additional claims, belatedly set up by the plaintiff in her fifth amended charge. In a joint letter to counsel for the parties, the trial judge indicated his proposed disposition of the case and, incident thereto, he requested counsel for the plaintiff to "draft proposed findings of fact in brief form" dealing exclusively with loss of seniority "before 1965" and "what methods may be possible to remedy any residual effects of such loss of seniority, if the court finds such loss to have occurred," and requested counsel for the defendant in turn "to prepare proposed findings of fact in favor of the defendant[s] on all of the separate issues that were raised at the trial which do not have to do with the single issue of loss of seniority." [17] It must be assumed from his statements in this letter that the trial judge found that, so far as her individual claim was concerned, the plaintiff was only "aggrieved" by her loss of seniority status, and he intended to limit her relief to this single specific claim of discrimination. The testimony at trial, it is true, had churned up some other issues, issues not concerned with broad, continuing sex discrimination on defendant's part, but issues involving practices long since abandoned by the defendant. These additional issues, the trial court seemingly regarded as wanting in substance, according to his joint letter to counsel to which we have previously referred. Since, however, both parties have devoted some parts of their argument to these other issues, we shall briefly discuss them.

The first of these additional claims dealt with the weight and hours-of-labor qualifications for certain jobs in defendant's plant. These qualifications are invalid under the Act, according to the plaintiff's contention.

[17] Some days later the trial judge wrote that there "is probably evidence which would suggest a change in past or in existing practices about posting or not posting notices of vacancies and available promotions."

The defendant does not seriously argue otherwise.[18] Any layoffs suffered by the plaintiff because of the unavailability of certain jobs for bidding by her occurred in the pre-Act period. These restrictions, however, had no adverse effect on the plaintiff and her seniority rights. Continuously from the effective date of the Act until her layoff in January, 1970, she was employed, suffering layoffs and earning an uninterrupted "company service" record for such period in the computation of her seniority

[18] Following the enactment of Title VII and in anticipation of its effective date, the defendant, according to the record, sought to amend its employment rules to conform. There was uncertainty at the time even on the part of the EEOC itself whether Title VII overrode state weight and hours-of-labor statutes regulating the employment of females. There was a general feeling, shared at least tentatively by the EEOC, that Title VII did not invalidate such laws. The weight and hours-of-labor regulations adopted by the defendant and inaugurated, it was asserted, represented the defendant's attempt to satisfy the requirements of both the federal and state law. There was some inconsistency, however, because the defendant operated plants in both Ohio and North Carolina; and it sought, according to its contention, to develop regulations which would comply with the laws of either state and thus to have uniform employment rules in all plants. These rules so adopted were thought to comply with the formal guidelines or regulations issued in 1965 by the EEOC itself, which specifically provided that "restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women; and that hours-of-labor statutes would be considered ordinarily "as a basis for application of the bona fide occupational qualification exception." 29 C.F.R. § 1604.1(c). In late 1968, however, the EEOC reversed its position on these two points and it was because of this change in the position of EEOC and the decision in *Bowe* v. *Colgate-Palmolive Company* (7th Cir. 1969) 416 F. 2d 711, that the defendant claims it abandoned in 1969 its employment rules on weight and hours-of-work requirements for female employees. The changes in the regulations of the EEOC between 1965 and late 1968 are fully discussed in Note, 61 *Cornell L.Rev.* 460 at 465-7 (1976); *Williams* v. *General Foods Corp.* (7th Cir. 1974) 492 F. 2d 399, 402-3; *Kober* v. *Westinghouse Electric Corporation* (3d Cir. 1973) 480 F. 2d 240, 243-5; *Vogel* v. *Trans World Airlines* (M.D.Mo. 1970) 346 F. Supp. 805, 809-11. *See, also,* § 2000e-12, 42 U.S.C.

and fringe benefit rights.[19] Moreover, all designations of any such jobs as male jobs and all weight qualifications therefor were discontinued entirely early in 1969, after the opinion in *Bowe* v. *Colgate-Palmolive Company* (7th Cir. 1969) 416 F. 2d 711, and the change in the regulations by the EEOC and before plaintiff's layoff in January, 1970. Nor is there the slightest suggestion in the record or reason to believe that there is any threat that such qualifications, abandoned by the defendant in 1969, will be reinstituted. In fact, as the evidence clearly reveals, the defendant has been attentive to any changes in either the regulations or the construction of the law and alert to conform its practices to such changes.

The plaintiff made some point, too, that she had not been considered for promotion to a supervisory position. She offered no real proof of her qualification for such promotion nor did she suggest in her testimony that she had ever applied for promotion. Such evidence as there is in the record on this point is represented by the explanation offered by the defendant why the plaintiff had not been given consideration for a supervisory position. This explanation consisted of undisputed testimony, concurred in by the plaintiff herself, that the plaintiff was unable to work amicably with her fellow employees and had been embroiled in difficulties with them. This was a perfectly valid reason for not considering plaintiff for a supervisory position. There is nothing in the record that would justify an inference that the reason was pretensive or pretextual; nor did the trial court find that it was pretensive. The defendant accordingly met any

[19] There is another reason for finding this claim without merit. At the time of her layoff in January, 1970, the plaintiff was offered a substantial number of "heavy" jobs. She refused and refused by her own explanation because she doubted her ability to perform these jobs. It would thus appear unlikely that, had a "heavy" job been open to her between 1965 and 1970, the plaintiff would have accepted one.

burden that may have rested on it for sustaining its failure to promote the plaintiff. *Cf.*, *McDonnell Douglas Corp.* v. *Green* (1973) 411 U.S. 792, 803-4. Nor did the plaintiff apparently consider that she had been treated unfairly or discriminately in this particular, for she did not in any one of her five charges assign this as a complaint. It is highly questionable under these circumstances that this issue was properly before the Court.[20] We have recently held that a suit under Title VII "may encompass only the 'discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge.'" *King* v. *Seaboard Coast Line Railroad Company* (4th Cir. 1976) —— F. 2d ——, slip opinion p. 3 (decided April 29, 1976).

The final peripheral issue concerns a test required by the defendant of employees seeking certain specialized work in three departments at defendants' plant. This test was inaugurated in 1970. Until 1970 all persons employed in these departments were required to take two other tests. These earlier tests, however, were discontinued in 1970 in favor of a new simplified mechanical aptitude test. This new test, which was required of all employees seeking to transfer to these departments after 1970, did not have any "discriminatory impact" on female applicants; on the contrary, the testimony shows

[20] In *Oatis* v. *Crown Zellerbach Corp.* (5th Cir. 1968) 398 F. 2d 496, 499, the Court said:

> "We thus hold that a class action is permissible under Title VII of the Civil Rights Act of 1964 within the following limits. First, the class action must, as it does here, meet the requirements of Rule 23(a) and (b)(2). Next, the issues that may be raised by plaintiff in such a class action are those issues that he has standing to raise (i.e., the issues as to which he is aggrieved, see § 706(a), supra), and that he has raised in the charge filed with the EEOC pursuant to § 706(a)."

See, also, Equal Employment Opportunity Commission v. *General Electric* (4th Cir. 1976) —— F. 2d ——.

that percentage-wise more females passed the test than males. And at the time of trial the employees in at least one of these departments had more female employees than male employees. In that situation, there was no obligation on the defendant to validate this new test. The burden of establishing the job-relatedness of a test arises "only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody* (1975) 422 U.S. 405, 425.[21] The trial court, however, found the new test improper because the then existing employees in those departments had not been required, as a condition of retaining their jobs, to take the new, less exacting tests. If the existing employees had been given their jobs without any

[21] This was recognized by the trial court, which, in a colloquy with plaintiff's counsel, stated that "unless the test as administered shows that women flunk more than men, there is no question presented about the testing."

See, also Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 *Harv. L. Rev.* 1598, 1659. The authors add (p. 1660):

> "Psychologists have criticized this test by claiming that it will not predict job performance, but there is evidence that the criticism may be inaccurate. More important, this criticism is not relevant to the equal employment issue. So long as the test does not prefer whites over blacks or any other protected minority group, it does not violate equal employment requirements. If an employer hired every fifth applicant on a random basis, his selection procedure would be arbitrary and might not relate well to job performance, but it would not deny equal employment opportunity * * *."

This is so because the Act itself very specifically declares that a party is only entitled to relief if his discharge or layoff or loss of any right was because of "discrimination on account of race, color, religion, sex, or national origin * * *." § 2000e-5(9), 42 U.S.C.

Cf., Washington v. *Davis* (1976) —— U.S. ——, 44 LW 4789, for comparison of rule under due process and under Title VII.

testing or after taking less "stringent" tests, we would find this argument appealing, but all these employees had secured their positions after successfully completing two tests, considerably more exacting and broader in scope than the test presently required (i.e., the simplified mechanical test). It would obviously be unfair to impose on these employees, who had qualified for their jobs by taking both the Modified Alpha and Bennett Mechanical Tests, to condition their continued right to their jobs on their taking the new simplified mechanical test. Nor do the guidelines established by the EEOC require such unfair treatment. These guidelines expressly provide that only when older employees have "qualif[ied] under less stringent selection standards [as] previously enforced "will the validity of the new tests depend on whether these older employees have qualified under the new tests. 29 C.F.R. § 1607.11. Such guidelines, while not binding on the courts, are to be given great deference.[22] We find them reasonable and fair and consonant with the purposes of Title VII, *et seq.* Since obviously the new test was "less stringent" than the earlier tests, under which these employees qualified for their jobs, there was no basis in the record for holding that unless such employees again qualified by taking the new test, no subsequent applicant for employment on such jobs could be required to take the new test, which admittedly had no discriminatory impact.

We come now to the plaintiff's individual claim that the layoff in 1970 resulted from an improper deduction in her "company service" record of time lost due to alleged sex-discriminatory layoffs in the pre-Act period of her employment. Under the defendant's seniority system, "company service" is an employee's period of employment, less layoffs. Such "company service" fixes the

[22] *Griggs* v. *Duke Power Co.* (1971) 401 U.S. 424, 433-4.

priority rights of employees in bidding for other job vacancies in cases of layoff and in qualifying for certain fringe benefits. It is obviously of great value to an employee;[23] it has been well characterized as an employee's "personal investment in a job."[24] Plaintiff's claim is that the defendant, by following a discriminatory practice of limiting female employment to certain job classifications, narrowed the opportunity of its female employees to bid on an equal basis with male employees for job vacancies in the plant, thereby causing a female employee to suffer generally more layoff time than a comparably qualified male employee. To illustrate the effect of such practice in her case, she points out that she has suffered five layoffs between 1952 and July 2, 1965, whereas males employed subsequent to the plaintiff suffered no layoff time prior to January, 1970. These layoffs of the plaintiff changed the beginning date of her "company service" from 1952 to 1955, and it was this latter date she was required to use in bidding for job vacancies.

The defendant does not dispute the method of calculating "company service" as claimed by the plaintiff. It does suggest that all of plaintiff's layoffs prior to January, 1970, took place before July 2, 1965, the effective date of Title VII and that such layoffs, whether discriminatory or not, were not illegal at the time. It does not follow, however, that, though they occurred before the effective date of the Act, these layoffs may not result in a violation of the Act if they have an adverse effect on the employee's seniority rights after the Act became effective. The bellwether authority in this area is the oft-

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[23] For a pertinent statement of the importance of such standing, *see Franks* v. *Bowman Transportation Co., Inc., supra,* at pp. 16-19, slip opinion.

[24] Note, *Remedies: Retroactive Seniority—The Courts as Personnel Director,* 29 *Okla. L. Rev.* 215 (1976).

cited case of *Quarles* v. *Philip Morris, Incorporated* (E.D. Va. 1968) 279 F. Supp. 505, 517-8. That case held (a) that only a *bona fide* seniority system was protected under the Act, (b) that "one characteristic of a *bona fide* seniority system must be lack of discrimination," and (c) that a seniority system, however neutral facially, is not a *bona fide* seniority system if it "has its genesis in racial [or sex] discrimination," whether pre-Act or post-Act.[25] Accordingly, *Quarles* established that any seniority system which carried over into the post-Act period the effects of a pre-Act discriminatory job assignment policy disadvantaging a black [or a female] in seniority rights was not a *bona fide* seniority system under the Act and had to be adjusted to remedy that disadvantage. This decision has been consistently followed by this Circuit[26] and its ruling has been adopted in repeated decisions of other Circuits since[27] and has been approved by the legal

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[25] *Ibid.*, 517.

[26] *United States* v. *Chesapeake and Ohio Railway Company* (4th Cir. 1972) 471 F. 2d 582, 587-8, *cert. denied* 411 U.S. 939 (1973); *Brown* v. *Gaston County Dyeing Machine Company* (4th Cir. 1972) 457 F. 2d 1377, 1382, *cert. denied* 409 U.S. 982 (1972); *Robinson* v. *Lorillard Corporation* (4th Cir. 1971) 444 F. 2d 791, 795, *cert. dismissed* 404 U.S. 1006, 1007; *United States* v. *Dillon Supply Company* (4th Cir. 1970) 420 F. 2d 800, 803-4; *United States* v. *Continental Can Company* (E.D.Va. 1970) 319 F. Supp. 161, 166.

[27] *United States* v. *T.I.M.E.-D.C.* (5th Cir. 1975) 517 F. 2d 299, 315, U.S. Appeal Pending; *United States* v. *Navajo Freight Lines* (9th Cir. 1975) 525 F. 2d 1318, 1324-25; *Pettway* v. *American Cast Iron Pipe Company* (5th Cir. 1974) 494 F. 2d 211, 224; *United States* v. *N.L. Industries, Inc.* (8th Cir. 1973) 479 F. 2d 354, 360-1, where many of the authorities are cited; *United States* v. *International Bro. of Elec. Wkrs., L.No. 38* (6th Cir. 1970) 428 F. 2d 144, 150, *cert. denied* 400 U.S. 943 (1970); *Jones* v. *Lee Way Motor Freight, Inc.* (10th Cir. 1970) 431 F. 2d 245, 248, *cert. denied* 401 U.S. 954 (1971); *United States* v. *Bethlehem Steel Corporation* (2d Cir. 1971) 446 F. 2d 652, 660-1; *Schaefer* v. *Iannian* (E.D.Mich. 1975) 394 F. Supp. 1136, 1142. *Cf., however, Jersey Cen. Pow. & Lt. Co.* v. *Local Un. 327, etc. of I.B.E.W.* (3d Cir. 1975) 508 F. 2d

writers.[28] It is conceded by the defendant that in the pre-Act period, the jobs in certain departments were reserved exclusively for male employees and that in periods of layoff only qualified male employees could bid on the jobs in these departments. Such a system obviously gave the male employee a preferred opportunity to protect his "company service" over the female employee. This more extensive opportunity in bidding for vacancies during layoffs on the part of male employees was a discrimination against female employees, and because that discrimination was carried over in the operation of the post-Act seniority system it tainted such post-Act system. To such extent as the plaintiff was prejudiced thereby in the computation of her "company service" or seniority rights, she is entitled to relief. This the District Court correctly concluded.

The plaintiff is accordingly entitled to a judgment requiring an adjustment in her "company service" status sufficient to remove the adverse effect of any pre-Act discriminatory layoffs. The District Court left for further determination the extent of such adjustment and the plaintiff's right, if any, to back pay.[29] The District

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687, 706-7, U.S. Appeal Pending; and *Waters* v *Wisconsin Steel Works of Int. Harvester Co.* (7th Cir. 1974) 502 F. 2d 1309, 1319-20, U.S. Appeal Pending.

[28] *See*, Cooper & Sobol, *supra*, at pp. 1617, *et seq.*; and Sheeran, *Title VII and Layoffs Under "Last Hired, First Fired" Seniority Rule*, 26 *Case West. Res. L. Rev.* 409, 449, *et seq.* (1976).

[29] In her representation to the District Court, as set forth in the District Court's order of January 24, 1974, to which reference has heretofore been made, the plaintiff disclaimed any intention of claiming back pay. In making such concession she may have been considering whether such a claim had any reasonable basis in the record. After all, at the time of her layoff in 1970 and again in 1973, the plaintiff had been offered a large number of jobs in the plant, some of them at least being jobs theretofore classified as "heavy" jobs. She refused all such proffers. She would justify her refusal of those which might be classified as "heavy" on the ground that

Court, however, did not confine its ruling to plaintiff's individual claims, but proceeded as if it were dealing with a class action, despite the representations in the record and the limitation in discovery imposed on the defendant by the ruling that the action was purely an individual suit, to grant relief which required a general re-arrangement of the defendant's entire seniority system, *as applied to both male and female employees*, including new rules for determining vacancies and supervisory promotions, even though it is well settled that a finding of either racial or sex discrimination in the establishment or operation of a seniority system, even in a class action, requires that such seniority system "be modified only as it applies to those employees who were previously subjected to discrimination, only to the extent necessary to remove the elements perpetuating that discrimination, and only for a limited period of time. Such

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she was told that, if she chose one of such jobs and was unable to do the job, she would be "fired." We have been pointed to no evidence where she justified her refusal of the offer of those jobs which were not classified as "heavy." So far as the rule with reference to "heavy" jobs of which she complained, it did not appear to be disputed that the rule, both for male and female employees, was that an employee who took such a job and failed to perform satisfactorily would be fired. In imposing such a standard on the plaintiff in connection with her right to bid for so-called "heavy" jobs, the defendant was imposing no different standard than that it imposed on male employees. *See, Williams* v. *American Saint Gobain Corp., Okmulgee, Okl.* (10th Cir. 1971) 447 F. 2d 561, 568. Assuming this to be true, there would seem to be no impropriety on grounds of sex discrimination in the requirement, the exaction of which the plaintiff claims as an excuse for refusing these job offers. Whether such offers of other jobs, some "heavy" and some not, as well as her formal representation that she did not seek back pay, operated as a bar to a right to back pay we leave, as we have said, to further proceedings in the District Court. See § 2000e-5(g), 42 U.S.C.: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. * * *" *See, also, Williams* v. *American Saint Gobain Corp.* at pp. 567-8, and *United States* v. *Bethlehem Steel Corporation* (2d Cir. 1971) 446 F. 2d 652, 665-6.

a system should be allowed to apply unabated to all employees, black and white, against whom the employer did not discriminate." *Stevenson* v. *International Paper Co., Mobile, Alabama* (5th Cir. 1975) 516 F. 2d 103, 118.[30] The additional relief provided in the District Court's order, going beyond that to which plaintiff was properly entitled, was inappropriate and the order of the District Court should be modified to eliminate such provisions and terms. What we have said would apply to the inappropriate injunction against weight and hours-of-work rules of the defendant, such rules having been abandoned in 1969 and there being no reasonable basis to assume that they will ever be reinstituted.

The judgment below should accordingly be modified to include relief only in plaintiff's seniority rights as represented by the calculation of her "company service" records to such extent as she may show she was prejudiced as a result of defendant's policy of reserving certain jobs for male employees in the pre-Act period, and all other relief granted in the order of the District Court herein, should be vacated, other than a recognition of the right of the plaintiff to costs and an award of attorneys' fees. The cause is accordingly remanded for the entry of a decree in accordance with the foregoing and for such other proceedings as may be consistent herewith.

REMANDED FOR ENTRY OF DECREE IN ACCORDANCE WITH FOREGOING.

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[30] This conclusion is supported by the recent case of *Franks* v. *Bowman Transportation Company, Inc., supra,* 44 LW 4356, 4363-5, where the Supreme Court construed Title VII to allow seniority relief, in a class action, only for identifiable victims of the illegal hiring discrimination.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NANCE

v.

UNION CARBIDE CORP.

Appeal From the United States District Court
For the Western District of
North Carolina

Before BUTZNER, RUSSELL and WIDENER, Circuit Judges

(Filed July 28, 1976)

APPEAL FROM the United States District Court for the Western District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the cause is remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for the entry of a decree in accordance with the foregoing and for such other proceedings as may be consistent herewith.

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING

NANCE

v.

UNION CARBIDE CORP.

(Decided September 23, 1976)

RUSSELL, CIRCUIT JUDGE:

Upon consideration of the petition for rehearing by the appellee, it is

ORDERED, That the first six lines, and the words "After all" on line 7, of footnote 29, on page 30 of the Slip Opinion be deleted; and that the following "as well as her formal representation that she did not seek back pay," appearing in the first and second lines of the same footnote 29 on page 31 of the Slip Opinion, be deleted. The original opinion is reaffirmed in all other respects, and

The suggestion for *en banc* consideration fails, no judge having asked that the court be polled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

NANCE

v.

UNION CARBIDE CORP.

(Filed April 28, 1975)

McMILLAN, District Judge.

Winifred S. Nance, the plaintiff, a white female, filed this suit on August 18, 1972, against Union Carbide Corporation of Charlotte, North Carolina, alleging that she was subjected to discrimination because of her sex in the matter of employment, classification, promotion and other incidents of employment. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. This matter came on for a hearing in March, 1974 and December, 1974 and the Court, after consideration of the evidence, enters Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff, Winifred S. Nance, is a female citizen of the United States and the State of North Carolina, residing in Charlotte, Mecklenburg County, North Caro-

lina. The plaintiff has been employed by the defendant at its Charlotte plant since July 8, 1952.

2. The defendant, Union Carbide Corporation ("defendant" or "Company"), is a corporation organized under the laws of the State of New York and does business in all fifty states, including the State of North Carolina. The defendant maintains its corporate headquarters in New York City, New York.

3. The defendant operates a battery manufacturing facility in Charlotte, Mecklenburg County, North Carolina ("Charlotte plant").

4. The majority of the work performed (80-90%) at the Charlotte plant is pursuant to contracts with various federal agencies and the majority of these contracts are with the Department of the Army.[1]

5. The hourly paid work force at the Charlotte plant is organized into approximately sixteen (16) departments. The departments and a general description of the work performed in each are as follows:

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[1] By virtue of the fact that the majority of the work performed by the defendant at its Charlotte plant is pursuant to contracts with the federal government, the defendant is subject to Executive Order 11246 and the Regulations implementing this Order. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 984, n.3 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1969). Executive Order 11246 is a federal regulation that requires all employers subject to this Order not to discriminate against its employees or applicants for employment because of race, color, religion, sex or national origin. Executive Order 11246 became effective on October 24, 1965. 30 F.R. 12319; 3 C.F.R. 339. This Order was amended by Executive Order 11375, signed on October 13, 1967, which became effective in part on November 12, 1967, and in part on October 14, 1968, by substituting the word "religion" for "creed" as a prohibited basis of discrimination, and by adding sex as a prohibited type of discrimination. 32 F.R. 14303.

Department 107: Blends proper amounts of ingredient into mixes to be used in the manufacture of Magnesium and LeClanche cells.

Department 161: Produces magnesium cells to be used in the manufacture of magnesium batteries.

Department 208: Produces LeClanche flat cells by the non-refrigerated method and ties into appropriate stacks for subsequent use in scheduled LeClanche battery types.

Department 209: Produces LeClanche flat cells by the refrigerated method and ties into appropriate stacks for subsequent use in scheduled LeClanche battery types.

Department 210: Repairs cell stacks rejected at testing in the battery finishing department.

Department 215: Produces LeClanche round cells to be used in the manufacture of LeClanche batteries.

Department 225: Assembles all required parts into finished batteries.

Department 235: Manufactures parts to be used in the production of cells and finished batteries.

Department 300: Cleans-up plant and machinery.

Department 304: Provides employee relations department duties, such as pick-up and delivery mail; picks-up machinery parts; operates the canteen and operates the cash register in the cafeteria.

Department 311: Cooks, serves meals and cleans-up cafeteria.

Department 327: Provides upkeep of the plant building and services, installs, repairs, builds and maintains plant equipment.

Department 342: Warehousing-shipping-receiving, and supplying parts for the manufacturing departments as requested.

Department 354: Provides production line inspection of all operations.

Department 355: Sets up and checks on all inspection procedures within an assigned area.

Department 440: Machine operator adjuster.

6. There are over 160 different job classifications in the 16 departments at the Charlotte plant. The overwhelming majority of these job classifications are unskilled jobs.

7. The wage rate of each job is determined by the job class to which it is assigned. Unskilled jobs are designated as job classes 1 through 12 with job class 1 with the lowest rate and job class 12 with the highest rate. Skilled jobs are separately designated as job classes 1 through 7 and are some of the highest paying jobs at the Charlotte plant.

8. The majority of the female employees as of July 2, 1965, and August 8, 1972, were employed in unskilled job classes 1-7. All of the female employees in job class 9 were employed in departments 225 and 355; these departments have been two of the departments in which females have been employed.

9. Many of the jobs designated as "heavy" jobs do not, in fact, have a weight lifting (or exerted force factor) of 30 pounds or more. For example, the oiler's position in department 327 has an average exerted force of 15 pounds 50% of the time during the course of an eight-hour working day; outside warehouse operator in department 342 has an average exerted force of 2 pounds 75% of the time and 30 pounds 5% of the time; round cell machine operator/adjuster in department 440 has an average exerted force of 18 pounds 33% of the time and a maximum force of only 70 pounds 1% of the time; and process repair in department 225 has an average exerted force of 5 pounds 25% of the time (or 10 pounds 10% of the time) and only 85 pounds 1% of the time.

10. On July 2, 1965 (the effective date of Title VII), July 2, 1970, and August 18, 1972 (the date the complaint was filed in this Court) the staffing of the various departments by sex at the Charlotte plant was as follows:

Department	7-2-65		7-2-70		8-18-72	
	M	F	M	F	M	F
161	—	—	—	—	4	7
107	6	—	4	—	3	—
208	23	49	8	19	6	17
209	18	37	11	29	6	17
210	—	—	—	3	1	5
215	—	—	—	—	—	—
225	74	57	37	65	50	77
235	19	5	15	2	11	1
300	14	—	9	2	5	8
304	—	—	1	—	—	1
311	2	3	1	4	1	4
320	—	—	2	—	2	—
327	36	—	39	—	44	—
342	10	—	10	—	12	—
354	—	38	—	31	—	29
355	17	2	12	3	11	7
440	9	—	7	—	7	—
Totals	228	191	156	158	163	173

11. An analysis of the work force by sex as set forth in Finding No. 10 above shows the following:

(a) As of July 2, 1965, there were 419 hourly paid employees at the Charlotte plant; of these 228 were males and 191 were females. Of the 191 females, 181 or approximately 95% of the females were employed in only four (4) of the sixteen (16) departments (208, 209, 225 and 354). Only 115 or 50% of the males were employed in these same four departments. There were no males in department 354 and no females were employed in department 327 (skilled trades department).

(b) As of July 2, 1970 (five years after the effective date of Title VII), there were 314 employees; of these 156 were males and 158 were females. Of the 158 females 144 or approximately 91% were employed in only

four (4) of the sixteen (16) departments (208, 209, 225, 354) and 56 or approximately 36% of the males were employed in these same four departments. There were no males in department 354 and no females in department 327.

(c) As of August 18, 1972 (date complaint filed), there were 336 employees, of these 163 were males and 173 were females. Of the 173 females, 140 or approximately 181% were employed in only four (4) of the sixteen departments (208, 209, 225 and 354), whereas only 62 or 38% of the males were employed in these same four departments. There were no males in department 354 and no females in department 327.

12. An analysis of Plaintiff's Exhibits 19(A) through 19(I) (Labor Reports) shows that the overwhelming majority of the females were employed in only four (4) of the sixteen (16) departments (208, 209, 225 and 354) The percentages of females in these four (4) departments ranged from about 96% as of June 1, 1965, to about 78% as of June 1, 1973.

13. The defendant does not maintain lines of progression within the departments. Promotions, demotions, transfers, layoffs and recalls are governed by "company service credit" which is the seniority standard.

14. Company service, *i. e.*, seniority, is the length of time an employee has been employed at the Charlotte plant from his or her most recent date of hire *minus any and all times* during which the employee has been on lay-off because of a reduction in the work force. For example, the plaintiff, originally employed on July 8, 1952, has a company service date of July 21, 1956 for job progression and lay-off purposes. Plaintiff's seniority standing has been reduced by approximately four years because of five lay-offs she was forced to take before July 2, 1965, and the several times she has been laid off

since July 2, 1965 (January 23, 1970 and April 18, 1973).

15. From 1956, when the Charlotte plant re-opened, until November 18, 1969—more than four years after the effective date of Title VII—the defendant maintained an open and declared policy and practice of segregating its work force based on sex.

16. The job assignment policy set forth in the 1959 employee handbook provided that:

> For the purpose of job placement, increases and reduction in force, the following related job groups have been established:
>
> (1) All female jobs and (2) all male jobs, except as may be included in other special groups as machine shop, routine inspection, mail service employees, female service employees, etc.
>
> Job assignment procedures [*i. e.*, promotions, demotions, lay-offs and recalls] shall be applied within each job group separately and action resulting therefrom shall be limited to each such group. (Brackets supplied).

17. The job assignment policy set forth in the 1964 employee handbook provided that:

> For the purpose of job placement, increases and reductions in force, the following related job groups have been established:
>
> (1) All female jobs except those included in Group #2.
>
> (2) Female employees—Control Laboratory.
>
> (3) All male jobs except those included in Groups #4, 5 and 6.
>
> (4) Machine Shop.
>
> (5) 440 Department.

(6) Male employees—Control Laboratory.

Job Assignment procedures shall be applied within each such group separately and action resulting therefrom shall be limited to each such group.

18. The number of jobs limited to males was almost twice the number of jobs available to females.[2]

19. Prior to June 23, 1965, separate male and female seniority rosters were maintained. Males were hired into, promoted to, and laid off from those jobs limited to males and were credited with company service (seniority)[3] only as to the male jobs. The same practice was followed with respect to the jobs limited to females.

20. Prior to July 2, 1965, female employees were allowed to perform male jobs if they so requested; however, if females took male jobs, they were not allowed to qualify for the jobs, nor could they keep the jobs to avoid lay-offs because of the defendant's strict policy and practice of laying off employees based on the sex-segregated seniority rosters.

21. One result (but an important result for purposes of this case) of the separate male and female job classifications and seniority rosters set out in Findings 15, 16, 17, 18 and 19, *supra*, was that it was possible, and indeed did occur, that female employees would be laid off on the basis of their company service as compared to other females, while male employees with less company service and/or even later dates of original hire were retained. Whenever this situation did occur, the junior

[2] Defendant, in answers to interrogatories (Plaintiff's Exhibit 2(B)), identified approximately 97 jobs (including the trainees II and I and the A and B classifications in department 327) as exclusively reserved for males, and approximately 47 jobs as exclusively reserved for females.

[3] See Finding No. 14, *supra*.

males who were retained gained company service and the females who were laid off lost company service.[4]

22. The result set out in Findings No. 21 is exactly the situation of what has happened to the plaintiff. The plaintiff was initially hired at the Charlotte plant on July 8, 1952. Between July 8, 1952 and August 20, 1973 she was laid off seven (7) times, thereby losing company service of about four years. A summary of plaintiff's lay-offs is as follows:

Hired 7-2-52	Original company service (CS) date of 7-2-52
Laid off 12-13-53 Rehired [5] 5-2-55	Adjusted CS 11-14-53
Laid off 7-15-55 Rehired 9-28-55	Adjusted CS 1-25-54
Laid off 2-24-61 Rehired 8-21-61	Adjusted CS 7-21-54
Laid off 9-28-62 Rehired 2-11-63	Adjusted CS 12-3-54
Laid off 4-3-64 Rehired 1-25-65	Adjusted CS 9-25-55
Laid off 1-23-70 Rehired 7-20-70	Adjusted CS 3-20-56
Laid off 4-18-73 Rehired 8-20-73	Adjusted CS 7-21-56

23. All of the lay-offs in which plaintiff was involved prior to 1965 were the result of the sex segregated policies

[4] The opposite result could also occur, and did. But see Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), reversing in part, 272 F.Supp. 332, 344-345 (N.D.Ind. 1967) where the district court found that the sex segregated seniority system there involved had a similar effect on males and females as in the instant case.

[5] Recall from lay-off is referred to as a "rehire".

of the defendant; none of these lay-offs were the result of pregnancy leaves.

24. The following males have original hire dates subsequent to that of the plaintiff and none of them have been laid off at any time, including the January, 1970, and the April, 1973 lay-offs in which plaintiff was involved. Each has as his company service date his date of original hire; thus each has a competitive advantage as to seniority standing for job progression and protection from lay-offs superior to that of the plaintiff:[6]

Name	Date of Most Recent Hire	Company Service
George Hall	2-6-56	2-6-56
Bonner David Twitty	1-11-56	1-11-56
Carroll J. Stokes	1-2-56	1-2-56
Willard Paige	11-28-55	11-28-55
Hallbrook McCraw	11-14-55	11-14-55
Craig Barbee	10-31-55	10-31-55
Marvin Sutton	10-31-55	10-31-55
Bobby Joe McCorkle	10-31-55	10-31-55
Howard Morris	10-26-55	10-26-55

25. The following table shows the average time lost from company service credit ("company seniority" as currently defined by the defendant) of males and females within the same year of hire as of the week ending November 26, 1972:

[6] Other male employees who were initially employed after the plaintiff and who have a superior competitive seniority standing are set forth in Laslie's deposition (Plaintiff's Exhibit 9(A)), and Plaintiff's Exhibit 36(B), which shows hire dates and company service dates of male and female employees.

Average Time Lost By Males and Females Between Year of Hire and Week Ending November 26, 1972.[7]

Year of Hire	MALE (Average) Months	Days	FEMALE (Average) Months	Days
1952	10	26	66	20
1953	14	4	(no hires shown)	
1954	(no hires shown)		(no hires shown)	
1955		5	69	3
1956	1	26	85	17
1957	15	6	(no hires shown)	
1958	13	10	122	14
1959	(no hires shown)		(no hires shown)	
1960	7	25	(no hires shown)	
1961	11	20	50	
1962	10	16	(no hires shown)	
1963	10	18	(no hires shown)	
1964	8	15	(no hires shown)	
1965	9	20	24	3
1966	15	16	25	18
1967	18	12	25	1
1968	25	19	31	27
1969	27	13	(no hires shown)	
1970	10	6	16	7
1971	8	7	10	29

[7] The table is based on Plaintiff's Exhibit 36(B). The table was prepared by the plaintiff as follows: First, the difference in months and days between hire date and company service date as of November 26, 1972 was determined. This total was computed for each male hired in the same year and divided by that number. The same procedure was used for females. Each month was assumed to be 30 days with the exception of those employees who had a hire date or service date that falls on the 31st of the month. For example, entry No. 316, p. 12 of Plaintiff's Exhibit 36(B), Leazer—1578, male, hire date 12-31-58, continuous service date 12-31-58. Fractions of days equaling .5 and below were dropped and fractions of days exceeding .5 were added to the total; e.g., 20.42 days was entered as 20 days and 19.55 days was entered as 20 days.

26. In June, 1965, just over a week before the effective day of Title VII (July 2, 1965), the defendant adopted a twenty-five (25) pounds weight limitation policy. This policy was announced to employees at the Charlotte plant on June 23, 1965, by the plant manager. The pertinent portion of that policy is as follows:

> Beginning July 2, 1965, in order to comply with the effective date of the new Civil Rights Act, we will consider men and women, based on Company Service, for any job opening for which they can meet the qualifications. Only in cases where State or Federal law place restrictions on use of females will a job be considered as a "Male job" only. Generally, for instance, most state laws prohibit the employment of females in plants on the following occupations or capacities: "freight handling, trucking, or the frequency or repeated lifting of weights over 25 pounds". *The State of North Carolina leaves the weight factor to the judgment of management. In order that our plants may have a consistent policy, we have adopted the 25 pound maximum weight limitation.* North Carolina does have a law restricting all female employees to a maximum of a nine hour day in a manufacturing plant. We will, of course, have to comply with this and use this law in determining whether or not a job will be male or female. In addition, the duties of such job as janitor or matron may require limiting them to male and female employees.
>
> *This makes it necessary to abolish our present practice of having separate male and female employee seniority groups other than those jobs requiring specific skills, such as machine shop, 440 department, and Routine Process Inspector.*
>
> In the future job placement procedures, as well as laying-off and rehiring employees, will be handled on the basis of length of service[8] regardless of whether it is male or female, except in such instances where the job requires males only or females only. (Emphasis supplied).

27. The State of North Carolina does not have (and never did have at any time material to this case) a law imposing a weight limitation on jobs females could perform, and the decision to adopt a weight lifting requirement was based on federal court decisions from other jurisdictions.

28. The twenty-five pounds weight limitation policy adopted by the defendant in June, 1965, was a new policy and jobs as either male jobs or female jobs. Jobs requiring lifting or an exerted force[9] of twenty-five pounds or less were considered female jobs and jobs requiring exerted force of twenty-five pounds or more were considered male jobs. See Finding 9, *supra.*

29. The defendant, at or about the same time that it adopted the weight lifting requirement, abandoned its sex segregated jobs and rosters and classified the jobs as "male" or "either". The jobs classified as "either" were open to males and females whereas the jobs classified as "male" were limited solely to males. All of the jobs previously reserved for females were opened to males; however, only a few jobs previously reserved for males were opened to females.

30. The restriction on jobs designated as "male jobs" instituted in June, 1965, remained in effect until No-

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[8] "Length of service" is the same thing as company service. See Finding No. 14, *supra.*

[9] The terms "weight lifting" and "exerted force" may be used interchangeably herein, but both terms will have the same meaning whenever used. The term "exerted force" is the term used in the job analyses (Plaintiff's Exhibit 24(A)), whereas the term "exerted force (or lifting)" may be used in the job descriptions (Plaintiff's Exhibit 24(B)).

vember 18, 1969, and female employees were not considered for these jobs and were not given the opportunity to demonstrate their ability to perform these under any circumstances.

31. In addition to the weight restriction to carve out certain jobs for males, the defendant also relied on N.C.G.S. § 95-17 which limited the number of hours an employer could employ a female person to not more than forty-eight hours a week, or nine hours in any one day, or no more than six days in any period of seven consecutive days. However, between July 2, 1965, and November 18, 1969, when the defendant of its own accord eliminated the restriction on the number of hours a female could work in any one week, the work schedules established at the Charlotte plant were so arranged such that if females were allowed to qualify for male jobs, the defendant would not have been in violation of N.C.G.S. § 95-17.

32. As a result of the policies and practices set out in Findings 28 and 29, the plaintiff, between July 2, 1965, and November 18, 1969, was denied the opportunity to qualify for certain jobs reserved for males because of her sex on the basis of the defendant's stereotyped characterization of the sexes without regard to plaintiff's individual preferences and ability.

33. On November 18, 1969, a notice was posted on the bulletin boards at the Charlotte plant announcing the adoption of a new policy. The pertinent portions of that November 18, 1969, notice are as follows:

> From a plant standpoint we will be guided by these new decisions, and put into effect the following changes immediately:
>
> 1. *All* restrictions regarding the *number of hours a woman can work in any one day or week are eliminated.*

> 2. Job offering procedures will be handled as follows:
>
> a. Jobs having weight lifting requirements of thirty pounds or less, which are referred to as "Light" jobs will be offered according to the present regular job placement procedures. (This represents no change).
>
> b. Jobs requiring lifting of over thirty pounds, or comparable exerted force, referred to as "heavy" jobs, will be offered to men in accordance with present procedure. *However, any female may request any* "Heavy" job and will be considered, in line with her company service credit, for such opening. Naturally all qualifications for and requirements of the job would have to be satisfactorily met.
>
> 3. *In case of a reduction-in-force, a female employee will not be forced into a "heavy" job, and may elect lay-off if that is the only job available. The practice of not forcing a female employee to take "heavy" jobs will also be followed on any reduction within any department or related group.* (Emphasis in the original).

34. The thirty-pound weight limitation adopted in November, 1969, as was the twenty-five pound limitation adopted in June, 1965, was based on court decisions and was used to distinguish between male and female jobs.[10]

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[10] Several months before the November 1969 announcement, a memorandum from the defendant's Rocky River, Ohio, Divisional Headquarters was sent to the plant manager at the Charlotte plant stating, *inter alia*:

Subject: Weight Limitations—Female Employees

> *Several months ago a study was made to determine the effect of allowing women to lift more than 25 pounds at our plants and warehouses.* The study was precipitated by recent Federal Court decisions which ruled that the use of 30 and 35 pound weight limitations in establishing female jobs is considered to be reasonable and fair. These court cases were brought

35. The notice of the policy change announced in November, 1969, provided that female employees had to request heavy jobs. The intendment of this notice was that if females did not specifically request "heavy" jobs, they would not be considered for the "heavy" jobs. Although Moffitt, the then Charlotte plant manager, testified that a decision was made at the corporate level that the part of the November, 1969 policy providing that females had to specifically request heavy jobs would not be enforced, he also testified that his corporate decision was never formally announced to the employees.

36. Male employees were automatically considered for heavy jobs as a result of the November, 1969 policy change; they did not have to specifically request these jobs. In addition, male employees were eligible for all jobs previously reserved for females as a result of the policy adopted by the defendant in June, 1965. Finding No. 29, *supra*.

37. The decision to institute a weight-lifting limitation for female jobs at the Charlotte plant was made at the defendant's Divisional Headquarters in Rocky River, Ohio. The weight-lifting requirement was made applicable to the Charlotte plant because the defendant wanted the policy to be consistent at all of its plants. The defendant's weight lifting limitation policy was based on the Ohio statute, R.C. § 4107.43, which prohibited the employment of females in jobs requiring frequent or repeated lifting in excess of 25 pounds.

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about by female employees who questioned a company's right to set a maximum weight limit on the weight females could lift. In view of this development and the fact that questions had been asked by a few of our hourly female employees about this matter, we felt we should reconsider our long-standing position of limiting female employees to a 25 pound maximum. *After considering all factors we feel we can increase the maximum lifting limitations to 30 pounds* and be within what would be considered to be a fair standard. (Emphasis supplied).

38. In 1972 the Ohio Supreme Court in Jones Metal Products Co. v. Walker, 29 Ohio St.2d 173, 281 N.E.2d 1 (1972) ruled that R.C. § 4107.43 was pre-empted by Title VII under the Supremacy Clause of the Constitution and that it could not be enforced in Ohio for that reason. The United States District Court for the Southern District of Ohio reached the same results on March 24, 1971 in Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1093-1097, and the Sixth Circuit in General Electric Co. v. Hughes, 454 F.2d 730 (1972) affirmed the granting of an injunction against appropriate officials of Ohio in the enforcement of R.C. § 4107.43.

39. The policy announced in the November 18, 1969, notice remained in effect until shortly before the January 19, 1973, lay-off. In January, 1973, the defendant notified the employees that beginning with the job moves associated with the January 19, 1973, lay-off, men would be offered the opportunity to accept lay-off rather than being forced to take a "heavy" job.

40. The defendant's thirty-pound weight limitation policy has not been eliminated; it remains in full force and effect, notwithstanding the fact that the defendant in November, 1969, eliminated its policy of not allowing females to work on certain jobs because of defendant's alleged reliance on N.C.G.S. § 95-17 (Finding No. 31, *supra*), even though the Attorney General of North Carolina issued an opinion on November 25, 1969 (40 N.C.A.G. 363) stating that N.C.G.S. § 95-17 would be enforced, and notwithstanding Finding No. 38, *supra*.

41. The policies and procedures for filling vacancies at the Charlotte plant are as follows:[11]

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[11] Both the procedures for filling job vacancies and for reduction in the work force (lay-offs) involve all kinds of modifications and priorities. Compare Plaintiff's Exhibit 3(B), pp. 59-73; Plaintiff's Exhibit 3(D), pp. 65-83, and Plaintiff's Exhibit 3(E), pp. 68-80. Officials of the Company have recognized that these procedures are

(a) Employees within the particular department where the vacancy occurs are given first preference. This preference is, in effect, departmental seniority. (See Plaintiff's Exhibit 17 which is an announcement made to employees on January 13, 1970, wherein it was stated ". . . our regular job-filling procedure *has* always recognized departmental rights".)

(b) Second preference is given to employees in other departments who have, prior to the time the vacancy occurs, submitted a written request for a transfer to the department in which the vacancy occurs, and the desired shift must be indicated on the request for a departmental transfer.[12]

(c) A request for departmental transfer is valid only until the employee has accepted, refused or is laid off.

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complicated. Shore, plant manager, so testified. (See also Plaintiff's Exhibit 9A. Laslie, p. 71, "It is complicated"; Plaintiff's Exhibit 11, Humphreys, p. 52). A more apt description is "confusing". The Court will not attempt to summarize all of the modifications and priorities for the reason that most of the more detailed modifications and priorities probably will be eliminated as a result of the modifications that will be ordered.

The Company has abandoned its practice with respect to the use of "home department" in determining the priorities for filling vacancies. However, reference to "home department" was still used in setting forth the vacancy filling procedures in the 1973 Employee Handbook. Presumably, the Company will delete the reference to "home department" in the next printing of the handbook.

[12] The defendant has a separate form which is used in connection with a job change within a particular department. Requests for departmental transfers are filed with the Head of Employee Relations; requests for job changes within departments are filed with the departmental supervisor.

If an employee does not specifically request a transfer to department 327 (skilled trades) on the request for departmental transfer, generally the employee will not be considered for vacancies in 327.

The 1973 Employee Handbook provided that an employee could not specify a specific job in the request for departmental transfer.

(d) Notices of vacancies are not posted and employees must rely on word-of-mouth information about vacancies.

(e) The only reason advanced by the defendant for not posting vacancies is that it has never been the policy of the company to do so.

(f) A regular job vacancy is defined as a job opening which is expected to exceed or does exceed two (2) weeks duration and does not result from disability, scheduled vacation, leave of absence or loan of the regular job holder. All other vacancies are temporary vacancies, including job openings of regular employees who are absent due to disability not to exceed 26 weeks.

(g) The significance of defining a temporary vacancy so as to include job openings due to disability is that employees who cover the jobs during the period of disability assume the company service standing of the disabled employees and assume all of the job rights of the absent employee.

42. The policy of the defendant to give first preference to employees in the department in which vacancies occur puts female employees at a competitive disadvantage *vis-a-vis* their male counterparts because the overwhelming majority of the female employees are in only four of the sixteen departments. See Findings 10, 11 and 12, *supra*.

43. The lay-off procedures presently in effect at the Charlotte plant as of January 13, 1970, are set forth in Exhibit A attached hereto.

44. The lay-off procedures set forth in Exhibit A attached hereto are the same procedures used in the April 18, 1973 lay-off, except that males were given the option of refusing to take "heavy" jobs.

45. In addition to the lay-off procedure set forth in Exhibit A hereto, the following practices are applicable to lay-offs:

(a) Lay-offs are based on company service.

(b) None of the lists of employees to be laid off (original or final) are posted.

(c) Jobs to be operated during lay-off are not posted and employees are notified of whatever jobs may be available to them by word of mouth.

(d) Job rights of absent disabled employees are exercised by less senior employees who are performing the jobs of the absent disabled employees. See also Findings 42 and 43, *supra.*

(e) Prior to the April, 1973, lay-off, employees in department 327 (skilled jobs), 355 (routine or process inspectors) and 440 (machine adjusters) were not subject to the lay-off procedures applicable to other employees. The jobs in these departments are some of the highest paying, nonsalaried positions at the Charlotte plant. Traditionally, the positions in these departments have been reserved for male employees. See Finding No. 7, *supra.* Employees entering into these departments are required to pass several tests. See Findings Nos. 49 and 59 *infra.* However, female employees were not permitted to take these tests until late 1970.

(f) Male employees in departments 327, 355 and 440 who were laid off out of these departments had a choice of either accepting lay-off from the department, or if they had enough company service and had been upgraded from one of the production departments, they could "bump down" into production to avoid lay-off.

(g) In April, 1973, the special protection given to employees in departments 355 and 440 was eliminated and jobs in these departments were subject to

regular lay-off procedures. The special protection for male employees in department 327 was not removed and employees in this department continue to enjoy special protection.

46. Prior to recalling any employees from lay-off, employees then in the plant are given first preference to available job vacancies. One of the officials of the Company described the effect of the longstanding policy and practice by stating that ". . . when we were going to increase our production the first thing that we would do is that we would re-arrange the plant and therefore, as a rule the *more desirable jobs* are taken by those people who are in the plant and *the less desirable* jobs are left for new people being hired or people being called back from layoffs."

47. The defendant does not have any standardized procedure for advising employees on lay-off of the availability of job openings. In some instances employees are notified by telephone; in other instances they are notified by letter simply stating that jobs are available without specifying what jobs are available; yet in other instances, employees are notified by letter that jobs are available and the available jobs are listed.

48. Ninety-five percent (95%) of the female employees who have been laid off have returned as compared to sixty to seventy percent (60-70%) of the males who have returned from lay-off.[13]

49. Between 1950 and 1952 the defendant adopted the Test of Mechanical Comprehension ("Bennett Mechanical") and the Modified Alpha Examination, Form

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[13] The high rate of return of females from lay-offs formed the basis for the defendant to conclude in its 1973-74 Affirmative Action Plan that the Charlotte plant has been a desirable place for women to work and that the defendant had experienced no difficulty in obtaining female employees with requisite skills to fill jobs.

9, that persons interested in jobs in departments 327, 355 and 440 were required to successfully pass before they were considered for these jobs.[14] Incumbent male employees already in these departments at the time tests were instituted were not required to take or pass these tests in order to retain their jobs.

50. Female employees were not allowed to take the Modified Alpha and the Bennett Mechanical until late 1970.[15]

51. Between 1965 and August, 1970 (before any females were permitted to take the tests), over 100 males were permitted to take the Modified Alpha and the Bennett Mechanical; of these, more than twenty (20) had scores sufficient to qualify them for consideration for employment in either 327, 355 or 440. (See Plaintiff's Exhibit 33, *e. g.*, Entries Nos. 3, 4, 9, 13, 14, 15, 16, 30, 33, 38, 39, 40). Many others had scores sufficient to qualify them for jobs in at least one of the departments.

52. Of the fourteen (14) females who took the Bennett, only three had scores sufficient to qualify them for jobs in department 327 (*Id.*, Entries Nos. 131, 139, 157, and 159). Moreover, defendant's own expert witness testified that males tend to score higher than females on the Bennett.

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[14] Different passing scores on each test were established for each department:

Department	Alpha	Mechanical Comprehension
440	75	33
327	85	35
355	100	30

[15] The plaintiff testified that she was not aware of the tests until shortly before she first took the tests in 1970. The Plaintiff's Exhibit 33, which was compiled from Plaintiff's Exhibit Nos. 14c and 15c which are documents showing the test scores of employees, males and females, who took the Bennett Mechanical and the Modified Alpha.

53. Of the females who took both the Bennett and the Modified Alpha, only one (1) scored sufficiently to qualify her for a position in either of the three departments (*Id.*, Entry No. 131).

54. Of the 132 males and the 17 females who took the Bennett Mechanical between 1965 and December, 1970 (when test discontinued), the average (mean) score for females was 25.44 and for men 34.02—a difference of 8.58 points. A larger percentage of males than females received scores exceeding the passing or cut-off levels on the Bennett necessary for consideration for promotion to vacancies in departments 327, 355 and 440. The highest cut-off score for obtaining a job was 35 (department 327). Fifty-seven percent (57%) of the males but only twenty-four percent (24%) of the females who took the Bennett scored above 35. The lowest cut-off score for a job was 30 (department 355). Sixty-seven percent (67%) of the males and only forty-one percent (41%) of the females scored above 30. This Finding is based on Plaintiff's Exhibit 33).

55. On the Modified Alpha, a general intelligence test, females who took the test had a mean score of 76.97 and males had a mean score of 79.56 (*Id.*)

56. Defendant's own testing expert testified on direct examination that females tend to score less well on the Bennett than do males.

57. In December, 1970, the defendant stopped using the Bennett Mechanical and the Modified Alpha and on June 30, 1971, and so notified its employees. The decision to discontinue these tests was made by the then plant manager, Moffett.

58. The Modified Alpha and Bennett Mechanical were never validated (*i. e.*, shown to be job related) because it was determined by the defendant that the size of the

sample at the Charlotte plant would not be large enough to be statistically significant.

59. On July 30, 1971, one month after the employees had been notified that the modified Alpha and Bennett Mechanical had been discontinued, the defendant substituted new test requirements for departments 355 and 440; and on September 8, 1972, new test requirements were substituted for department 327.

60. A passing score of 70% was established for the new tests. The 70% passing score was established based on the experience as a teacher of one of the officials at the Charlotte plant.[16]

61. No validation studies were conducted with respect to the new tests.

62. Incumbent employees (all males in departments 355 and 440) were not required to take the new tests in order to retain their jobs and were thus "grandfathered" into their positions in these departments[17] on the basis of tests which the defendant has not demonstrated to be job related.[18]

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[16] The official was unable to state whether an employee making a score of 65 on these tests might be able to successfully perform on the jobs in question.

[17] There were over sixty (60) males in departments 327, 355 and 440 as of July 2, 1965 as compared to two (2) females (See Finding No. 8, *supra*). See Griggs v. Duke Power Co., 420 F.2d 1225, 1247 (4th Cir. 1970) (dissent by Sobleoff, J.).

[18] The EEOC, "Guidelines on Employment Selection Procedures", provide in Section 1607.11 that:

> The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by Title VII where other employees, applicants or members have not been subjected to that standard, Disparate treatment, for example, occurs where members of a minority *or sex group* have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force. (Emphasis supplied).

63. The defendant compiles two company service rosters—one showing the standing of employees by department and another roster showing the plant-wide company service standing. If an employee wants to know his departmental standing he must ask his departmental foreman; if the employee wants to know his plant-wide standing he must go to the Employee Relations Department. Neither of these rosters has ever been posted.[19]

64. The defendant maintains and compiles job descriptions and job evaluations. If an employee has any questions about whether the work he is asked to perform is covered in his job, he has an opportunity to see the job description; however, he is not given the opportunity to see the job evaluation. The job evaluations are more detailed than the job descriptions setting forth such factors as exerted force, training time, rate of pay and other items.[20]

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[19] Seniority rosters are computerized and are readily available.

[20] All or substantially all of the job descriptions and job evaluations contain the following paragraph:

> "The description of this job covers only a general outline of the duties of the job. Due to the varied nature of day time operation, it is impossible to include in detail all of the miscellaneous tasks that the job may require from day to day. In every instance, the operator is expected to produce a full eight-hour's task and that the supervisor, when possible, will endeavor to provide a full eight-hour's work."

65. Even though the job evaluations may have both an average and a maximum weight lifting or exerted force factor, the job descriptions which are shown to the employees state only the maximum weight lifting or exerted force element.

66. The defendant never had a female foreman at the Charlotte plant until shortly after the complaint was filed on August 18, 1972.[21] Foreman is a salaried position.

67. The procedure for selecting foremen (forepersons) is as follows: Whenever a vacancy for additional personnel occurs, the Plant Manager, the Head of Employee Relations, and the General Foreman, each makes individual lists of candidates. Each then rates each of the candidates as their first, second and third choices. The respective lists of candidates are then compared and the names of candidates with the most first choice votes are submitted to divisional headquarters in Rocky River, Ohio. Three names are generally submitted to divisional headquarters for a final decision.

68. Frances Black was the first female foreman at the Charlotte plant.

69. Frances Black was employed on January 3, 1967, as a secretary to the Head of Industrial Engineering and held that position until she was promoted to foreman on September 1, 1972. At the time of her promotion to foreman her salary increased from $7,140 to $9,000 yearly.

70. The defendant has hired or promoted more than 20 persons as foremen or salaried personnel since July 2, 1965; of these, only three have been females.[22]

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[21] The defendant had several females who were classified as linesmen during World War II; however, they were hourly-paid employees whereas foremen are salaried personnel (PX 9A, Laslie, pp. 49, 52).

[22] Frances Black, Johnnie Covington and Carol Betzold.

71. None of the female employees promoted to or assigned to foreman or supervisory positions after 1965 were formerly hourly paid employees, whereas a number of the males promoted after this date were formerly hourly paid employees.

72. The procedures used by the defendant for the selection of foremen and salaried personnel are based on purely subjective standards and there are no safeguards in these procedures designed to avert discrimination against females in selecting foremen and other salaried personnel.[23]

73. As a Federal Government Contractor, the defendant has an obligation to prepare and execute affirmative action programs. See n. 1 *supra*. Notwithstanding the defendant's commitment and obligation to the principle of the affirmative action programs, no efforts were made, nor were any programs established, nor were any detailed analyses of defendant's female work force made until the defendant prepared its 1973-74 Affirmative Action Program.

74. Although the defendant stated in its 1971 Affirmative Action Program that an in-depth analysis of its senority practices had been made, it simply had not been done.

75. There has never been a labor organization to represent employees at the Charlotte plant.

76. On or about August 22, 1972, shortly after the complaint was filed in this court, the defendant posted a notice on the bulletin board about the filing of the complaint. The notice stated, among other things, that the company had expected a ruling from EEOC that no discrimination was involved prior to the time that the complaint was filed, and that prior to the filing of the

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[23] See Rowe v. General Motors Corp., 457 F.2d 348, 358-359 (5th Cir. 1972).

complaint in federal court, the company believed that the employment discrimination claim asserted by the plaintiff was more of a personal matter between the company and the plaintiff. The defendant says that notice of the complaint was posted because of media coverage of the filing of the case and the number of questions raised by other employees concerning the filing of the case. The Court finds no impropriety in the posting of the notice.

77. On January 31, 1973 plaintiff accepted a connector's job.[24] Although the plaintiff had worked as a connector before this date and was considered a qualified connector, she had never performed this particular job which she was assigned in January, 1973. Plaintiff was advised that she would have six days to qualify; however, she was not given any instructions or training prior to the assignment. During the six days qualifying period Jimmy Smith was assigned to plaintiff as back up help, to catch those connections missed by the plaintiff. Jimmy Smith had never before been assigned to do this particular connection on a regular basis when the line was running. Three days after the plaintiff had been on this connection, she requested and received some assistance from Jessie Teeter because she did not believe that she was "catching on" as quickly as she should. At no time during plaintiff's qualifying period did her foreman or supervisor advise her that she was not making sufficient progress or that her reject rate was higher than the established standards, even though both her departmental foreman (C. R. Garner) and her immediate foreman (Clyde Williams) testified that they observed throughout the qualifying period that the plaintiff was not performing at a satisfactory pace. Plaintiff was never advised by her supervisor and foreman that she was not

[24] A connector's duties are to connect wires to a battery with the use of a soldering iron.

performing satisfactorily until the actual date of her disqualification.

78. On February 9, 1973, plaintiff was notified that she was disqualified as a connector. She was given a choice of "giving up" the job or being disqualified. During the qualification period plaintiff was earning $3.65 per hour; when she was disqualified, she was assigned to a job at a rate of $3.00 per hour.

79. Plaintiff filed a grievance protesting her disqualification. During the process she discussed the matter with Florence Laslie, Head of Employee Relations. Laslie advised plaintiff at one point that if plaintiff were willing to state that she was "nervous and upset" during the six-day qualification period, the disqualification would be removed from her record and plaintiff would be eligible for future connecting jobs.

80. At the time plaintiff was disqualified in February, 1973, the defendant had a policy that if an employee is disqualified as a connector, the only circumstances under which an employee can return to that classification is if there is a major change in the operation of the job or if there are extenuating circumstances approved by the plant management allowing the person to return to the classification.

81. Notwithstanding the practice set out in Finding 80, *supra*, plaintiff was assigned a different connecting job in the socket department to cover for an employee absent because of illness.

82. When plaintiff was recalled from lay-off, she was advised by John Vann, then Head of Employee Relations, of a number of jobs available to her; however, it was only after plaintiff specifically inquired about a connecting job that she was advised of the availability of this position. She was then advised by Vann that the rate of pay for connecting was $3.80 per hour; how-

ever when she returned to work from recall to a connecting position she was given a learner's rate of $3.65 per hour, and had to qualify for the position again.

CONCLUSIONS OF LAW

1. The Court has jurisdiction under Section 706(f)(1), of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(f)(1). (Ruling of the Court made during the trial).

2. The defendant Union Carbide Corporation is an employer within the meaning of Section 701(b) of Title VII, 42 U.S.C. Section 2000e(b) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. Section 2000e(b).

3. The plaintiff has complied with the procedural requirements of Sections 706(b), (e) and (f)(1) of Title VII, 42 U.S.C. Sections 2000e-5(b), (e) and (f)(1).

4. The relevant time period for determining defendant's liability and plaintiff's entitlement to relief is at and before the suit was filed. While the defendant's more recent practices may have a bearing on the question of relief, they do not affect the determination whether the defendant previously violated Title VII. United States v. International Brotherhood of Electrical Workers, Local 38, 428 F.2d 144, 151 (6th Cir. 1970), cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582 (4th Cir. 1972); cert. denied sub nom., Local 268 Broth. of R. R. Trainmen v. United States, 411 U.S. 939, 93 S.Ct. 1893, 36 L.Ed.2d 401 (1973); United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 556 (W.D.N.C. 1971).

5. Statistics carry much weight in cases brought under Title VII of the Civil Rights Act of 1964. Brown

v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir. 1972), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); United States v. Central Motor Lines, Inc., 338 F.Supp. 532, 556 (W.D.N.C. 1971); Young v. Edgcomb Steel Co., 363 F.Supp. 961 (M.D.N.C. 1973), reversed on issue not here involved, 499 F.2d 97 (4th Cir. 1974).

The statistics in this case which reflect that the overwhelming majority of females, including the plaintiff, in the Charlotte plant are employed in only four (4) out of the sixteen (16) departments, establish a *prima facie* showing that the defendant has discriminated against its female employees because of sex. Wetzel v. Liberty Mutual Insurance Co., 372 F.Supp. 1146, 1154 (W.D. Pa. 1974); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969), affirming in part and reversing in part, 272 F.Supp. 332 (S.D. Ind. 1967); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

6. The statistics and other evidence further establish that at the defendant's Charlotte plant females were, as recently as August, 1972, totally excluded from all jobs in Departments 327 and 440.

7. The *prima facie* case of discrimination in violation of Section 703(a), 42 U.S.C. Section 2000e-2(a) established by the statistics is confirmed by evidence that the defendant has engaged in the following discriminatory employment practices:

A. In June, 1965, the defendant, although abandoning its separate seniority rosters and job classifications based on sex, established categories designated "male" or "either". Females were not considered under any circumstances for those jobs designated as male jobs.

B. In June, 1965, the defendant established a twenty-five (25) pound weight limitation, the effect of which was to continue the male and female job classifications which existed prior to that date.

C. In November, 1969, the defendant adopted a policy of designating jobs as either "heavy" or "light". The defendant also increased its twenty-five (25) pound weight limitation to thirty (30) pounds. The thirty (30) pounds weight limitation and the designation of jobs as either "heavy" or "light" had the effect of distinguishing jobs at the Charlotte plant as either male or female. Females were not considered for jobs designated heavy unless they specifically requested such a job.

D. Female employees were not allowed to take any tests administered for entry into departments 327, 355 and 440 prior to August, 1970; and when the defendant abandoned the Modified Alpha and the Bennett Mechanical because it could not demonstrate that these tests were job related, the employees in these departments, all of whom were males, were not required to take the new tests instituted in 1971 as a prerequisite to retaining their jobs. The new tests instituted in 1971, and which are presently in use, have not been shown to be job related under the EEOC, "Guidelines on Employee Selection Procedures". 29 C.F.R. Section 1607.1-14, 29 C.F.R. 1607; 35 Fed.Reg. 1233 (Aug. 1, 1970).

E. The weight limitation policies established by the defendant are based on sterotyped characterization of females and males because of sex.

8. Title VII of the Civil Rights Act of 1964 was designed "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent

cannot be maintained if they operate to 'freeze' the status quo of prior discrimination practice". Griggs v. Duke Power Co., 401 U.S. 424, 429-430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971); Collins v. Union Carbide Corp., 371 F.Supp. 260, 264-265 (S.D. Tex. 1974); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) and 489 F.2d 896 (7th Cir. 1973); Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968).

9. Where, as in this case, a company has in the past operated a sexually segregated system of employment in which assignments to particular job classifications and departments were restricted on the basis of sex, the continued reliance on a seniority system (*i. e.*, company service) which gives male employees a competitive advantage over female employees in terms of promotions, transfers, lay-offs and recalls, perpetuates the effects of past discrimination and constitutes a present pattern or practice of impermissible discrimination against female employees, depriving them of employment opportunities and adversely affecting their status as employees because of their sex within the meaning of Section 703(a)(2), 42 U.S.C. Section 2000e-2(a)(2). Bowe v. Colgate-Palmolive, *supra*; Ostapowicz v. Johnson Bronze Co., 369 F.Supp. 522 (W.D.Pa. 1973); Danner v. Phillips Petroleum, 447 F.2d 159 (5th Cir. 1971), affirming 3 EPD ¶ 8336 (W.D.Tex., May 18, 1970); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971); Chrapliwy v. Uniroyal, Inc., 6 FEP Cases 98 (N.D.Ind., July 5, 1973), and 7 FEP Cases 343 (N.D. Ind., February 27, 1974). See also, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582 (4th Cir. 1972); Rock v. Norfolk & Western Ry. Co., 473 F.2d

1344 (4th Cir. 1973), cert. denied, sub. nom. United Transportation Union, Lodge No. 550 v. Rock, 412 U.S. 933, 93 S.Ct. 2754, 37 L.Ed.2d 161 (1973); United States v. Central Motor Lines, 338 F.Supp. 532 (W.D. N.C. 1971); Hairston v. McLean Trucking Co., 62 F.R.D. 651-669 (M.D.N.C. 1973); Russell v. The American Tobacco Co., 374 F.Supp. 286 (M.D.N.C. 1973); Young v. Edgcomb Steel Co., 363 F.Supp. 961 (M.D.N.C. 1973), reversed on ground here not relevant, 499 F.2d 97 (4th Cir. 1974).

10. Where, as in this case, a company has in the past operated a sexually segregated system of employment in which assignment to, lay-off from, and recall to job classifications were done on the basis of sex, the adoption of a job allocation procedure which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice where it operates as a disguised form of classification by sex, and creates unreasonable obstacles to the advancement by females into jobs which females would reasonably be expected to perform. EEOC, "Guidelines on Discrimination Because of Sex", 29 C.F.R. 1604.3(a) and (b); Laffey v. Northwest Airlines, Inc., 366 F.Supp. 763 (D.D.C. 1970), order entered 374 F. Supp. 1382 (D.D.C., April 3, 1974); Rinehart v. Westinghouse Electric Corp., 4 EPD ¶ 7520 (N.D. Ohio, August 11, 1970); Cheatwood v. South Central Bell T. & T. Co., 303 F.Supp. 754 (N.D. Ala. 1969); Bowe v. Colgate-Palmolive Co., *supra*; Trivett v. Tri-State Container Corp., 368 F.Supp. 137 (E.D. Tenn. 1973); Taylor v. Goodyear Tire & Rubber Co., 6 FEP Cases 50, 57 (N.D. Ala., July 31, 1972) (jobs designated heavy and light).

11. Where, as in this case, a company has historically classified its employees on the basis of sex, it is impermissible for the company to rely on word-of-mouth notice of job vacancies. Brown v. Gaston County Dyeing Machine Co., 457 F.2d, *supra*, at 1383; United States v. Dillon Supply Co., 429 F.2d 800, 802 (4th Cir. 1970).

12. The question whether the defendant discouraged its female employees, including the plaintiff, from accepting heavy jobs in 1970 and thereafter is immaterial to the issue whether the defendant practiced discrimination in its employment practices from and after July 2, 1965. Wetzel v. Liberty Mutual Ins. Co., 372 F.Supp. 1146, 1154 (W.D. Pa. 1974).

13. Under Title VII, 42 U.S.C. Section 2000e-7, reliance on state laws cannot justify discriminatory practices where such laws conflict with federal laws. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1005 (9th Cir. 1972) (state law on work week for women); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225-1227 (9th Cir. 1971).

14. Only if a challenged practice is found to be essential to overriding, legitimate, non-sexual business purpose, such as safety and efficiency, can the practice in question be allowed to stand. Robinson v. Lorillard Corp., 444 F.2d 791, 797-798 (4th Cir. 1971) (there must be no acceptable alternative which would better accomplish the business purpose); Griggs v. Duke Power Co., *supra*; Wetzel v. Liberty Mutual Ins. Co., *supra*. The defendant has failed to show that the practices here challenged are supported or required by business necessity.

15. In order to rely on the bona fide occupation qualification exception set forth in Section 703(e), 42 U.S.C. Section 2000e-2(e) with respect to its weight lifting policy, the defendant has the burden of proving by a preponderance of the evidence that all or substantially all females would be unable to perform safely and efficiently the duties of the jobs involved. Weeks v. Southern Bell T. & T. Co., 408 F.2d 228, 232 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d *supra*, at 717-719; Spro-

gis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1604.3(b). The defendant has not met this burden.

16. Where an employer has engaged in a pervasive practice of discrimination on account of sex, affirmative and mandatory relief is required in order to insure full enjoyment of the right to equal employment opportunities. In ordering relief, a court should not parrot the Act, but should offer affirmative relief which is appropriate to insure the full enjoyment of employment rights. United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1052-1053 (5th Cir. 1969).

17. In such cases the court has not merely the power but the duty to render a decree which will as far as possible eliminate the discriminatory effects as well as bar like discrimination in the future. Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965); Rosen v. Public Service Electric and Gas Co., 477 F.2d 90, 95-96 (3rd Cir. 1973) (sex discrimination).

18. In order to remedy the present and continuing discrimination based on sex and to remedy the competitive seniority disadvantage to the plaintiff stemming from the defendant's pre-1965 practices of maintaining segregated jobs and rosters, and promotions, transfers, lay-offs and recall procedures based on sex:

A. There must be a modification of reliance on company service seniority and departmental preference in defendant's vacancy filling procedure.

B. The defendant will be required to institute a seniority system based on revised seniority dates for purposes of promotions, departmental transfers, lay-offs and recalls. Collins v. Union Carbide Corp., 371 F.Supp. 260, 266-268 (S.D. Tex. 1974); Bowe v. Colgate Palmolive

Co., 489 F.2d 896 (7th Cir. 1973), affirming, 6 FEP Cases 1123 (S.D. Ind. 1972); Watkins v. United States Steel Workers of America, AFL-CIO, 369 F.Supp. 1221 (E.D. La. 1974); United States v. Central Motor Lines, Inc., 338 F.Supp. 532, 560 (W.D.N.C. 1971); Chrapliwy v. Uniroyal, *supra*; Danner v. Phillips Petroleum Co., *supra*; Guthrie v. Colonial Bakery Co., 6 FEP Cases 663 (N.D. Ga., March 8, 1973).

C. The defendant will also be required to post in conspicuous places throughout the Charlotte plant notice of all vacancies and rosters showing such revised seniority standing of all employees. Young v. Edgcomb Steel Co., 363 F.Supp. *supra*, at 972 (M.D. N.C. 1973), reversed on issue here not relevant, 499 F.2d 97 (4th Cir. 1974). Guthrie v. Colonial Bakery Co., 6 FEP Cases 662, 665 (N.D. Ga., March 8, 1973).

D. The defendant will be enjoined from giving first preference to employees in the plant when vacancies occur during the periods when a reduction in the work force is in effect, and all vacancies at all times will be offered to employees on the basis of the revised date of seniority. Guthrie v. Colonial Bakery Co., 6 FEP Cases 662 (N.D. Ga., March 8, 1973); Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973).

E. The defendant will be enjoined from requiring the plaintiff to successfully pass any tests currently used for jobs in departments 327, 355 and 440 because her male counterparts in these departments were not required to take these tests. Griggs v. Duke Power Co., 420 F.2d 1225, 1231 (4th Cir. 1970) (see also dissent by Sobeloff, J., 420 F.2d at 1247); Ostapowicz v. Johnson Bronze Co., 369 F.Supp. 522, 539 (W.D. Pa. 1973); NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974). Russell v. American Tobacco Co., 374 F.Supp. 286 (M.D. N.C. 1973); Young v. Edgcomb Steel Co., 363 F.Supp. 961 (M.D. N.C. 1973).

F. The defendant's weight lifting limitation policy should be discontinued. Weeks v. Southern Bell T. & T., *supra*; Schaeffer v. San Diego Yellow Cab, *supra*; EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. 1604.4.

19. Where employment discrimination has been clearly demonstrated, employees who have been victims of that discrimination must be compensated if economic loss can be established. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 921 (5th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973); Rosen v. Public Service Electric and Gas Co., 477 F.2d 90, 95-96 (3rd Cir. 1973).

20. The statistics showing the foreman and supervisory work force by sex and the defendant's reliance on subjective criteria for the selection of its supervisory work force demonstrate that defendant has discriminated against its female employees in the selection of its supervisory personnel. Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Gilmore v. Kansas City Terminal Ry., 509 F.2d 48 (8th Cir. 1975); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382-1385 (4th Cir. 1972).

21. The defendant has intentionally engaged in the unlawful employment practices described herein within the meaning of Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(g). Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972).

22. Plaintiff is entitled to recover her costs and reasonable attorneys' fees as part of her costs.

23. The clerk is requested to set this case for a conference among court and counsel to try to arrive at a method of establishing appropriate revised seniority dates for the plaintiff and other female employees, and to draft an appropriate order.

EXHIBIT A TO FINDINGS OF FACT

RULES GOVERNING THE LAYOFF ON JANUARY 23, 1970, AT THE CHARLOTTE PLANT

1. Determine the level of operation needed to meet the demand for batteries.
2. Determine the number of employees needed to operate at this level and make staffing sheets accordingly.
3. Determine the excess number of employees in the plant. This becomes the number of employees to be laid off.
4. Departmental Foremen announced the layoff and explained the effect on this layoff of the new court ruling governing weight restrictions for women. One member from the Plant Manager's Department or Employee Relations Department attended the departmental meetings to help answer questions.
5. Make a temporary layoff list by listing the youngest employee in the plant according to company service until the prescribed number for layoff is reached.
6. On paper, remove the laid off employees from the departments.
7. On the basis of the new requirements, determine the employees to remain in each department and the employees to be set aside on the surplus list.
8. The surplus employees from each department comprise the plant wide surplus list.

9. The jobs left unfilled by the removal of the employees on layoff become the job opening list.

10. After laid off and surplus employees are removed from the departments, rearrangements are made within each department.

11. Those remaining in the departments may turn down jobs within their department. The opening created will be filled by offering it to those employees from that department on the surplus list. If no one wants the opening, the youngest employee in terms of company service from that department will be forced to take the opening. An employee who elects to go on the surplus list loses his home department rights unless it is a case of a woman being offered a heavy job.

12. After all departments have completed their respective rearrangements, the resulting job openings are offered in accordance with company service to those employees who are on the surplus list or who have in requests.

13. Men on the list may take light jobs if they have enough company service to get them. If only heavy openings are left, men are required to take them.

14. Women can take heavy or light openings if their company service warrants. However, women cannot be forced to take heavy openings.

15. The point is reached where there are only heavy openings available and only women are left to take them and they refuse. The youngest employees in terms of company service on light jobs in the plant, men or women, are removed from their jobs and set aside in their respective departments until a sufficient number of openings for those women on the surplus list is attained.

16. The employees remaining in the departments are then given the chance to rearrange to the resulting openings. Those employees on heavy jobs who have less service than the oldest employee on the surplus list will not be allowed to rearrange to a light job. Those employees on heavy jobs who have more service than the oldest employee on the surplus list are given the opportunity to rearrange to the light jobs. All remaining employees on light jobs may rearrange according to the vacancy filling procedure to light jobs since this does not affect the number of light jobs available.

17. Those employees removed from light jobs then have the opportunity to displace employees in their department on heavy jobs who have less company service than they. The total number of employees on heavy jobs with less company service than those removed from the light jobs are removed from their jobs. The department is again rearranged according to the vacancy filling procedure. The remaining openings are then offered to those employees in the department who have been removed from their jobs to the point where there are still enough light jobs available for the women on the original surplus list.

18. The light jobs created for the women on the original surplus list are then offered to them.

19. All those employees removed from their jobs to create openings for others with more company service are then offered the plant wide openings which in all probability are heavy openings. All men must take these jobs. Women may take the heavy jobs or elect layoff. For the number of women electing layoff, a corresponding number of men or women will be recalled from the layoff list to fill the heavy openings.

20. Women on the layoff list may elect to take the heavy openings or remain on the layoff list. Men must take the heavy openings.

21. These heavy openings are offered to those recalled from the layoff list according to company service. If one recalled from layoff is from a department where there is an opening, he does not have home department rights but can only get in that particular department if he had enough company service to warrant him a chance.

ORDER AMENDING AND SUPPLEMENTING FINDINGS OF FACT

This cause coming on to be heard on motion of Defendant for an order amending the findings of fact and conclusions of law heretofore filed by the Court, and the Court having heard arguments of counsel and considered exhaustive proposed changes and additions, it is

Ordered, that the Motion to amend findings of fact is denied as to paragraphs 5, 6, 8, 10, 11, 12, 15, 19, 24, 26, 28, 29, 30, 33, 34, 38 and 40 of Defendant's Motion.

Ordered, that the Motion to add findings of fact is denied as to paragraphs 1, 7, 13, 17, 20, 23 and 48 of Defendant's Motion.

Ordered, that the following additional findings of fact be made:

1. Objections were made by the defendant to the introduction of evidence or to the consideration of evidence as to the charges contained in Plaintiff's Exhibit 1(e), which is the charge dated February 25, 1971, filed by the Plaintiff with the EEOC. After getting all of the files of the Equal Employment Opportunity Commission and examining them, the following is found to be the sequence of events: Plaintiff's letter charge to the EEOC (Plaintiff's Exhibit 1A), dated March 30, 1970, containing certain charges was filed on April 14, 1970. Plaintiff's Exhibit 1B, another letter to EEOC making a complaint, was filed on June 22, 1970. Plaintiff's Exhibit 1C, a charge on EEOC Form 5, was filed on October 19, 1970. Plaintiff's Exhibit 1D, an amended additional charge, was filed on February 16, 1971. The filing of Plaintiff's Exhibits 1A, 1B, 1C and 1D were communicated in due course to the Defendant. A later charge, Plaintiff's Exhibit 1E, is a further charge, dated February 25, 1971, bearing EEOC case File No. TAT1-2569. Plaintiff's Exhibit 1E was missing from the original file received by the Court from the EEOC but was discovered in a separate file, No. TAT1-2569. From the EEOC file stamps and from a communication from the Equal Employment Opportunity Commission, dated October 12, 1971, the Court finds that this charge (Plaintiff's Exhibit 1E) was filed with Mr. Nails of the EEOC on or about February 25, 1971, and it bears a February 25, 1971 stamp of the Atlanta office of the EEOC. The difference in the numbers on these charges results from the fact that the TAT numbered files are original Atlanta files, and when these cases were transferred in the early or middle part of 1971 to the Charlotte District Office of the EEOC, they were given Charlotte file numbers which begin with the code letters TCT. The original Atlanta file in Plaintiff's case, TAT1-2569 is now and since mid-1971 has been Charlotte File No. TCT2-0346. It further appears that on May 27th of 1971, following some findings of the field director, Mrs. Nance wrote the EEOC a lengthy letter referring to the February 25, 1971 claim or charge (Plaintiff's Exhibit 1E) complaining about it and requesting additional action. It further appears that as of April 3, 1972 a formal notice, EEOC Form 131, was sent to the Defendant giving notice under File No. TCT2-0346 of a charge under date of February 25, 1971, alleging discrimination on the basis of sex in promotions, job classifications, and terms of conditions of employment. Inferentially, this appears

to be the charge in question, although the Court can make no positive finding to that effect. From the foregoing, the Court finds that all of the claims advanced in Plaintiff's Exhibit 1E, that is, the charge of February 25, 1971, were fully advanced before the Commission and were considered or should have been considered by the Commission in the preparation of its final action leading up to the issuance of the right to sue letter (Plaintiff's Exhibit 1F). It, therefore, appears that the charges contained in Plaintiff's Exhibit 1E are proper subjects of evidence in this case if they are relevant under the pleadings and general issues raised in the suit.

The record is not clear as to when the Defendant actually received notice that the amended charge of February 25, 1971, had been filed. The Court ruled that unless there was some clear-cut evidence that the claims included in the February 25, 1971 charge constituted a complete surprise to the Defendant and that entertaining them at trial would constitute gross unfairness to the Defendant, the Court intended to proceed with the evidence without further inquiry on the particular subject. (Tr. 125-129; Court Exhibit No. 1). The Defendant failed to demonstrate that the February 25, 1971 charge constituted surprise or that it would be grossly unfair for the Court to entertain the claims contained in that charge.

2. More than 80% of Union Carbide's Charlotte production is batteries for the United States military. The level of production and employment fluctuates depending on the Defendant's ability to secure government contracts. The cyclic nature of this business requires frequent layoffs and recalls (Def. Ex. 1, 8a; Tr. 446-448).

3. The Plaintiff has been affected by three layoffs since the passage of Title VII. She was laid off in 1970 and 1973 rather than accept a heavy job. She avoided layoff in 1972 by accepting a heavy sweep and move in Department 225. The jobs offered to the Plaintiff

at the time of all three of these layoffs were based on the Plaintiff's company service standing or seniority which is the subject of Findings of Fact Nos. 19-24 filed April 28, 1975. (Def. Ex. 4; Ex. 10 to Pl. Ex. 9A; Tr. 490, 560).

4. Prior to being laid off on January 23, 1970, the Plaintiff was offered and turned down twenty-five (25) jobs.[1] If she had accepted one of these jobs, she would not have been laid off but would have remained in the plant and continued to accrue Company service (Tr. 478). The Plaintiff was offered jobs in Departments 208, 210, 225, 300, 327, 342 (Def. Ex. 6c, 6d, 6e; Tr. 477-478). Less senior employees accepted the jobs turned down by the Plaintiff and thereby remained in the plant and continued to accrue Company serivce. The Plaintiff remained on layoff until July 20, 1970.

5. On March 13, 1970, while on layoff, the Plaintiff was offered seven (7) jobs.[2] Had she accepted one of these seven (7) jobs she would have been recalled from layoff. She refused these jobs and they were taken by less senior employees (Tr. 603-605). On May 18, 1970, while still on layoff, the Plaintiff was offered three (3) jobs which she refused.[3] On July 20, 1970, the Plaintiff

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[1] One (1) feeding job in Department 225; one (1) AC Line takeoff job in Department 225; one (1) A feeder job in Department 225; two (2) sweep and move jobs in Department 225; one (1) line assembly job in Department 225; two (2) upstairs packing jobs in Department 225; one (1) spare heavy job in Department 208; one (1) recovery coordinator job in Department 210; one (1) maintenance job in Department 327; three (3) material handler jobs in Department 342; two (2) heavy janitor's jobs in Department 330; one (1) scrap hauler truck driver's job in Department 342; eight (8) machine cleaner's jobs on second shift (Tr. 477-478).

[2] One (1) supply and shovel job in Department 208; one (1) sweep and move job in Department 208; five (5) machine cleaner's jobs in Department 330 (Tr. 603).

[3] One (1) material handler's job in Department 342 and two (2) machine cleaner's jobs in Department 300 (Tr. 604).

accepted a job as a conveyor expeditor and was recalled from layoff (Def. Ex. 4; Ex. 10 to Pl. Ex. 9A).

6. On February 7, 1972, the Plaintiff was again involved in a plant rearrangement and layoff. She was forced off of her line assembly job in Department 225 but avoided being laid off by accepting a sweep and move (heavy) job in the same department (Def. Ex. 4; Ex. 10 to Pl. Ex. 9A).

7. On April 18, 1973, the Plaintiff was laid off. Prior to electing layoff, she was offered, and refused, approximately sixteen (16) jobs. Had the Plaintiff accepted one of these sixteen (16) jobs, she would have remained in the plant and continued to accrue Company service (Def. Ex. 7a, 7b, 7c). The Plaintiff remained on layoff until August 20, 1973, when she was recalled as a Connector in Department 225 (Def. Ex. 4).

8. The Plaintiff has been offered jobs in Departments 208, 209, 210, 225, 300, 327, 330, and 342 in connection with the 1970 and 1973 layoffs (Def. Ex. 6c, 6d, 6e, 7a, 7b, 7c; Tr. 477-478, 603-604).

9. In December, 1970, the Defendant discontinued its practice of requiring candidates for Departments 327, 355, and 440 to take and pass the Modified Alpha and Bennett Mechanical Exams. The Department substituted a "Mathematical Skills Inventory" test for candidates for Department 355. The record shows that sixteen (16) employees have taken this new test: eight (8) males and eight (8) females. Of the eight (8) males who have taken this test, five (5) passed and three (3) failed. Of the eight (8) females who took this test, six (6) passed and two (2) failed.

It is further ordered, that the Findings of Fact heretofore filed by the Court be amended as follows:

1. Add the following sentence at the end of finding of fact number 7:

> Skilled jobs specially designated as job classifications 1-7 are all located in Department 327 and include such occupations as electricians, millwrights, mechanics, machinists and welders (Tr. 485).

2. Amend finding of fact number 8 to read as follows:

> The majority of male and female employees as of July 2, 1965, and August 18, 1972, were employed in unskilled job classes 1-7. As of August 18, 1972, all of the female employees in job class 9 were employed in Department 225 and 355. On the same date all male employees in job class 9 were employed in Departments 225 and 355 with the exception of one (1) male employee in Department 235 and two (2) male employees in Department 107. There were forty (40) jobs in wage classification 9 on August 18, 1972; males held twenty-one (21) of these jobs and females held nineteen (19) (Pl. Ex. 35).

3. Amend finding of fact number 9 to read as follows:

> All jobs designated as heavy jobs require an employee to exert a force of thirty (30) pounds or more at least one time per eight (8) hour day. Jobs which do not require an exerted force of thirty (30) pounds are classified as light jobs.

4. Amend finding of fact number 16 to read as follows:

> The job assignment policy set forth in the 1959 employee handbook provided that:
>
> For the purposes of job placement, increases and reductions in force, the following related job groups have been established:
>
> (1) All female jobs and (2) all male jobs, except as may be included in other special groups such as

machine shop, routine inspection, male service employees, female service employees, etc.

Job assignment procedures shall be applied within each such group separately and action resulting therefrom shall be limited to each such group.

5. Amend finding of fact number 18 to read as follows:

Prior to June, 1965, the number of job classifications limited to males was almost twice the number of job classifications available to females (Pl. Ex. 2B, Answers Nos. 14 and 16).

6. Amend finding of fact number 26 to read as follows:

In June, 1965, just over a week before the effective date of Title VII (July 2, 1965), the Defendant adopted a twenty-five pound weight standard. This standard, along with hours, was used to classify jobs as "male" jobs or "either" jobs. This new policy was announced to employees at the Charlotte plant on June 23, 1965, by the Plant Manager. The pertinent portion of that policy is as follows:

Beginning July 2, 1965, in order to comply with the effective date of the new Civil Rights Act, we will consider men and women based on Company service, for any job opening for which they can meet the qualifications. Only in cases where State and Federal laws place restrictions on use of females will a job be considered as a "Male Job" only. Generally, for instance, most state laws prohibit the employment of females in plants in the following occupations or capacities: "freight handling, trucking, or the frequent or repeated lifting of weights over 25 pounds. *The State of North Carolina leaves the weight factor to the judgment of management. In order that our plants may have a consistent*

policy, we have adopted the 25 pound maximum weight limit. North Carolina does have a law restricting all female employees to a maximum of a 9 hour day in a manufacturing plant. We will, of course, have to comply with this and use this law in determining whether or not a job will be male or female. In addition, the duties of jobs such as janitor or matron may require limiting them to male or female employees.

This makes it necessary to abolish our present practice of having separate male and female employee seniority groups other than on those jobs requiring specific skills such as Machine Shop, 440 Department, and Routine Process Inspectors.

In the future job placement procedures, as well as laying off and rehiring employees, will be handled on the basis of length of service regardless of whether the employee is male or female, except in instances where the job requires male only or females only (emphasis supplied).

7. Amend finding of fact number 33 to read as follows:

On November 18, 1969, a notice was posted on the bulletin boards at the Charlotte plant announcing the adoption of a new policy. The pertinent portions of that November 18, 1969, notice are as follows:

From a plant standpoint we will be guided by these new decisions, and put into effect the following changes immediately:

1. *All* restrictions regarding the *number of hours a woman can work in any one day or week are eliminated.*

2. Job offering procedures will be handled as follows:

a. Jobs having weight lifting requirements of 30 pounds or less, which are referred to as "Light" jobs, will be offered according to the present regular job placement procedures. (This represents no changes.)

b. Jobs requiring lifting of over 30 pounds, or comparable exerted force, referred to as "Heavy" jobs, will be offered to men in accordance with present procedure. *However, any* female may *request* any "Heavy" job and will be considered, in line with her Company Service Credit, for such opening. Naturally all qualifications for and requirements of the job would have to be satisfactorily met.

3. In case of a reduction-in-force, a female employee will not be forced into a "Heavy" job, and may elect layoff if that is the only job available. The practice of not forcing a female employee to take a "Heavy" job will also be followed on any reduction within a department or related job group (emphasis in original).

8. Amend finding of fact number 71 to read as follows:

The Defendant has hired or promoted more than twenty (20) persons to foreman or salaried positions since July 2, 1965; of these five (5) have been females (Pl. Ex. 2A, No. 53).

9. Amend footnote 22 to read as follows:

Frances Black, Johnnie Covington, Carol Betzold, M. B. Hunter, and J. L. Mallonee (Pl. Ex. 2A, No. 53).

JUDGMENT OF THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

NANCE

v.

UNION CARBIDE CORP.

(Filed October 14, 1975)

This cause having come on for a trial before the Court, sitting without a jury, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having been entered on April 28, 1975 and amended by order dated July 10, 1975 it is

HEREBY ORDERED, ADJUDGED AND DECREED:

The defendant Union Carbide Corporation ("the defendant" or "Company"), its officers, agents, employees, successors, servants and all persons in active concert or participation with the Company shall be and are hereby permanently enjoined and restrained from discriminating against the plaintiff because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., at the Company's facilities located in Charlotte, Mecklenburg County, North Carolina. "Company," as used herein shall refer only to the Mecklenburg County, North Carolina, facilities of the defendant.

I. *The Seniority System.*

A. The Company is permanently enjoined from implementing, maintaining or giving effect to any seniority system, policy, or practice, including reliance on Company service credit and departmental seniority as defined in the Company's employees' handbooks, which is designed to or has the effect of discriminating against its female employees because of their sex.

B. The Company is hereby ordered to implement and to continue a system of original hire (or employment) date seniority with respect to all matters for which seniority or length of service is used, including promotions, demotions, lay-offs, and recalls for all work assignments or job vacancies. "Original hire (or employment) date seniority" as used herein shall mean the most recent date of continuous employment with the Company.

C. Vacancy for puropses of this judgment shall mean any job or work assignment which is expected to exceed two (2) or more weeks duration, including but not limited to a work assignment resulting from disability, a scheduled vacation, a leave of absence or a loan or temporary transfer of a regularly assigned job holder.

II. *Lay-Offs of Employees.*

A. On and after the date of the entry of this Order the Company is enjoined from continuing to operate under its present reduction in force lay-off procedures.

B. The Company is hereby ordered to implement the following procedures to govern a reduction in force:

1. After the Company has determined the level of operation needed to meet the demand for batteries during the reduction in force and has determined the number of employees needed to operate at this level, staffing sheets or manning tables showing jobs, by department,

to be operated during the reduction in force, shall be posted on bulletin boards in conspicuous places throughout the Charlotte plant for benefit of the employees.

2. The excess number of employees, or temporary lay-off list, shall be initially determined by removing those employees having the least original hire (or employment) date seniority, without regard to department job or work assignment. This list shall be posted on bulletin boards in conspicuous places throughout the Charlotte plant.

3. Employees whose names do not appear on the temporary lay-off list (or remaining employees) are then to be given the opportunity to rearrange or make job selections among those jobs to be operated during the reduction in force based on original hire (or employment) date seniority. The rearrangement shall be conducted without regard to job, department or work assignment. If two or more remaining employees select the same job and there are more employees than positions in the job slots, preference shall be given to the employee (or employees) with the longest original hire (or employment) date seniority.

4. Remaining employees may elect to go on the lay-off instead of exercising their preferences as provided in paragraphs II B 3 herein. If additional employees are needed to perform jobs necessary to meet the demand for batteries during the reduction of force, work assignment shall be offered to those employees on the temporary lay-off list based on original hire (or employment) date seniority.

III. *Recall of Employees.*

The Company is enjoined from giving first preference for job vacancies or work opportunities to employees then working in the Charlotte plant. All employees, including employees actually on lay-off, shall be given the

opportunity to bid for all job vacancies or work opportunities based on original hire (or employment) date seniority.

IV. *Weight Lifting Limitation Policies.*

A. The Company is enjoined from implementing, maintaining, or giving effect to any practice or policy of establishing weight lifting requirements for any of the jobs at the Charlotte plant which are designed to or which have the effect of discriminating against its female employees in the terms, conditions and privileges of employment or which are designed to or which have the effect of designating or characterizing jobs as male jobs or female jobs.

B. Female employees who bid for a job vacancy and are entitled to consideration for the vacancy based on original hire (or employment) date seniority shall be given a reasonable opportunity to demonstrate their ability to perform the job. Reasonable opportunity as used herein shall mean a period of not less than two (2) weeks, unless the defendant can establish that a shorter period of time would be ample.

V. *Testing.*

A. The Company is enjoined from requiring the plaintiff to successfully pass any written tests currently utilized for vacancies or work assignments in departments 327, 355 and 440, unless and until such time as the Company can demonstrate to the Court that any test or tests it proposes to use after the date of the entry of this Order has been validated in accordance with the "Guidelines on Employee Selection Procedures," promulgated by the United States Equal Employment Opportunity Commission.

B. The Company is further enjoined from giving preference to any employees for job vacancies or work assignments in departments 327, 355 and 440 who have, prior to the date of the entry of this Order, successfully passed the written tests enjoined herein,

VI. *Postings.*

A. *Job Vacancies and Work Opportunities:* The Company shall post notice of all job vacancies or work opportunities without regard to the department where the vacancy occurs in conspicuous places throughout its Charlotte plant. Further, the defendant is directed to establish a procedure for notifying all employees who may be on lay-off of all vacancies or work opportunities available at the Charlotte plant. All employees, including those who are on lay-off, shall be given the opportunity to notify the Company of their interest in the vacancy or work opportunity in writing, either by signing the posted job vacancy or otherwise. Selection of a candidate from among those employees who have expressed an interest in writing in the job vacancy or work opportunity shall be on the basis of original hire (or employment) date seniority. No later than two (2) days after the vacancy or work assignment has been awarded, the Company shall post the name and the seniority date of the successful candidate (or candidates) in conspicuous places throughout the plant.

B. *Seniority Rosters:* The Company shall post on bulletin boards in conspicuous places throughout the Charlotte plant copies of seniority rosters showing the name, sex and original hire (or employment) date seniority of each employee. The seniority rosters shall be revised as need be at intervals of no less than every three (3) months.

C. *Job Descriptions and Job Analysis:* The Company shall post a copy of existing job descriptions and job

analyses, as from time to time revised, on bulletin boards in conspicuous places at its Charlotte plant. Such descriptions and analyses (a) are for informational purposes only, (b) are not intended to indicate all the duties to be performed, and (c) will be used for no purpose other than to inform employees of the general nature of the job.

VII. *Supervisory Personnel*

A. The Company is enjoined from implementing, maintaining or giving effect to any criteria or procedure utilized for the selection of supervisory personnel which is designed to or has the effect or discriminating against its female employees.

B. The Company is ordered to formulate objective criteria for the promotion or selection of supervisory personnel. Job descriptions and selection criteria for supervisory positions shall be prepared by the Company for all supervisory positions at the Charlotte plant within thirty (30) days after the entry of this Judgment, which descriptions (a) are intended for informational purposes only, (b) are not intended to indicate all the duties to be performed, and (c) will be used for no other purpose than to perform employees of the general nature of supervisory positions. The Company shall provide counsel for the plaintiff with copies of the job descriptions and criteria for the selection of supervisory personnel, and unless the plaintiff objects to the description and selection criteria within thirty (30) days after receiving said copies, such descriptions and selection criteria shall be deemed to comply with this Order. Copies of the descriptions and selection criteria shall be posted on bulletin boards located in conspicuous places throughout the Charlotte plant.

C. The Company shall file vacancies in supervisory positions at the Charlotte plant with females, except

when the Company is unable to promote or hire qualified females, until the percentage of females in supervisory positions approximately equals the percentage of females in the Charlotte plant as of August 18, 1972. The Company is not required to file any supervisory position with a person not qualified for said position nor is the Company required to retain any person in such position, if after a reasonable time, she is unable to perform competently the duties of such position.

VIII. *Back Pay for the Plaintiff.*

The parties agreed during the trial with the consent of the Court to sever for trial purposes the issues of defendant's liability and plaintiff's entitlement to back pay on the one hand, and, on the other hand, the amount of back pay to be awarded to the plaintiff should the Court find in favor of the plaintiff on the entitlement issue. Counsel for the parties are directed to meet and confer within thirty (30) days of the entry of this Order for the purposes of discussing and/or agreeing upon the back pay issues. Absent an agreement among the parties, the parties are directed to disclose and exchange pertinent documents and records relevant to this subject and to submit their respective positions concerning this subject to the Court within forty-five (45) days of the entry of this Order. The Court will thereafter enter an Order on this matter.

IX. *Costs and Attorneys Fees.*

A. The plaintiff be and is hereby awarded her costs in this action including reasonable counsel fees and expenses.

B. Counsel for the parties are directed to meet and confer within thirty (30) days of the date of this Order for the purpose of agreeing upon costs, reasonable attorneys fees and expenses. Absent such an agreement,

(1) counsel for the plaintiff is directed to file with the Court a statement of time for which counsel fees are claimed and an itemization of costs and expenses, and (2) the defendant is directed to file a statement with the Court setting forth the basis by which the Company has compensated their counsel and the dollar amount it has paid or expects to pay its counsel in this action. If the parties are unable to agree on costs, counsel fees and expenses, the respective statements required herein, shall be filed with the Court within forty-five (45) days of the entry of this Order.

X. *Records and Reports.*

A. The Company shall maintain appropriate records of all actions taken pursuant to this Order and shall allow counsel for the plaintiff to inspect these records after fifteen (15) days' notice.

B. The Company shall make bi-annual reports to the Court, with copies to counsel for the plaintiffs, the first report being due July 1, 1976, and each six (6) months thereafter for a period of two years, which shall contain:

1. *Supervisory Positions:* (a) a listing of all supervisory vacancies, by title and department which have occurred since the last report; (b) the name, sex and original hire date of the person or employee selected for each supervisory position; (c) current roster showing name, sex, job title, original hire date and department for supervisory personnel at the Charlotte plant; and (d) the name, sex, job title, department and original hire date of each supervisory employee terminated, demoted, or transferred from the Charlotte plant or from some other plant of facility of the Company to the Charlotte plant.

2. Thirty (30) days prior to the implementation of any new written tests at the Company's Charlotte plant,

the Company shall provide the Court and counsel for the plaintiff with copies of the validation study or studies conducted by the Company which demonstrate the newly devised test meets the standards of Paragraph V(A) herein. Plaintiff's counsel will have thirty (30) days to object to the use of the proffered test. Nothing in this Judgment shall prohibit the Company from administering said new tests to incumbent employees for the purpose of preparing a professional validation study so long as the raw data arising from such validation studies are not used to the detriment of incumbent employees.

XI. *Notice.*

The Company shall give notice of this Order to all of its employees at the Charlotte plant by posting copies of this Order on bulletin boards in conspicuous places throughout the plant for a period of ninety (90) days immediately following the entry of this Order.

XII. *Rentention of Jurisdiction.*

The Court retains jurisdiction of this matter to issue such other orders and to conduct such other proceedings as may be necessary to effectuate this Order.

This 14 day of October, 1975.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

RULE 23 FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Action

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of the action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any case action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include

and describe those whom the court finds to be members of the class. The judgment is an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

Supreme Court, U. S.
FILED
JAN 14 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-824

WINIFRED S. NANCE,
Petitioner,

vs.

UNION CARBIDE CORPORATION, CONSUMER PRODUCTS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-824

WINIFRED S. NANCE,
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vs.

UNION CARBIDE CORPORATION, CONSUMER PRODUCTS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Union Carbide Corporation, Consumer Products Division (hereinafter "Union Carbide"), the Respondent herein, respectfully submits that a Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in the above numbered case should not issue for the reasons set forth below.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Western Division of North Carolina (A. 23a)[1] are officially reported at 397 F. Supp. 436. The judgment of the District Court has not been reported but appears at A. 73a of the Petition. The opinion of the Court of Appeals for the Fourth Circuit (A. 1a) is officially reported at 540 F.2d 718. The order of the Court of Appeals denying Petitioner's petition for rehearing and suggestion for rehearing en banc has not been officially reported but appears at A. 22a of the Petition.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the Petition at p. 2.

QUESTION PRESENTED

The Respondent submits that the questions presented by the Petitioner erroneously interpret the issues decided by the court below. The question presented should be:

> Whether broad class action relief is appropriate in a Title VII action that was admittedly not brought, maintained or certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure where such relief is patently unnecessary to remedy the alleged discrimination against the individual plaintiff?

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1. References to portions of the opinions below that are reprinted in the appendix to the Petition are designated as (A. .....) with the appropriate page number cited. References to the Petition are designated as (P. .....) followed by the page number on which the cited material appears.

STATUTES INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII" or "the Act") are set forth in the Petition at pp. 3-4.

STATEMENT OF THE CASE

This action involves allegations of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. Between April 14, 1970, and July 15, 1971, the Petitioner, Winifred S. Nance (hereinafter "Nance"), filed five charges of discrimination with the Equal Employment Opportunity Commission. As the Fourth Circuit correctly found, "all [of the charges] arose basically out of her layoff" (A. 1a-2a). On August 18, 1972, the complaint in this action was filed. The prerequisites for class action treatment set forth in Rule 23 of the Federal Rules of Civil Procedure were not pleaded in the complaint. Union Carbide subsequently moved for a more definite statement as to the class of persons, if any, that Nance sought to represent. This motion was denied by the district court on the express condition "that the plaintiff plead or file stipulations with regard to the class action aspects of the case, indicating more specifically the make-up of the class and the identity of the plaintiffs" (A. 2a). In response to this order, Nance filed the following stipulation for the record:

> This action was not brought as a class action pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, when the action was initially filed in Court on August 18, 1972. Plaintiff does not contemplate at this time seeking to amend the Complaint to allege a class action, however, plaintiff is of the opinion that whatever benefits she may obtain in this action

should inure to the benefits of other similar situated females of the defendant in the Mecklenburg County, North Carolina facilities of the defendant (P. 5).

The individual character of this action was again noted by the district court in an order sustaining Nance's objections to certain interrogatories posed by Union Carbide concerning back pay for females other than Nance. As the court put it, these interrogatories did not have to be answered because "this suit was brought and remains an individual action and not a class action" (A. 3a).

The trial of this case began on March 12, 1974, and lasted for eight days. Early in the trial proceedings, counsel for Nance responded to a question by the district court concerning the class aspects of the case by once again stating:

> This is not a class action, Your Honor. I would call the Court's attention to the fact that this matter was raised very early in these proceedings. The Court asked us to state our position on the class. Our position at that time was that even though there was not a class action, we did think that the relief in terms of the policies under attack, if the Court grants relief, should inure to the benefit of other females at the plant. That statement is on file with the Court.

Nance's position concerning the individual nature of this case has never changed. She has never sought to have this action certified as a class action pursuant to Section (c)(1) of Rule 23.[2] Nor has she ever attempted

2. Rule 23(c)(1) provides in part: "As soon as practicable after the commencement of a class action, the court shall determine whether it shall be so maintained". *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 760 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974) ("the plaintiff, not the judicial system controls whether or not to ask for class action treatment").

to define a class, if one exists, of similarly situated individuals or to show that the prerequisites for class treatment listed in Section (a) of Rule 23 have been met.[3]

After trial, on April 1, 1974, the district court directed the plaintiff and defendant to file proposed findings of fact and conclusions of law on specified issues.[4] Both parties submitted proposed findings on all issues raised at trial. On April 28, 1975, more than a year after trial on the merits, the court adopted Nance's proposed findings of fact and conclusions of law on all issues raised at trial.

Thereafter, Nance submitted an unsolicited proposed judgment which the district court adopted with only minor changes (A. 73a-81a). In spite of the fact that Nance had repeatedly stated that this was an individual action and not a class action, the court adopted the overly broad and unduly burdensome injunctive relief proposed by Nance. Such relief went far beyond that which was even remotely necessary to remedy any discrimination that Nance as an individual may have suffered. Indeed, the relief ordered extended beyond the relief that would have been appropriate in a class action. For example, the mandatory portions of the district court's injunction required

3. Rule 23(a) provides:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

4. The district court's letters to counsel requesting the submission of proposed findings are set forth in the Petition at p. 7, n. 2. As indicated in these letters, immediately after trial the court was predisposed to enter findings in favor of Union Carbide on all issues raised at trial, except the issue of seniority lost in layoffs prior to 1965 and, possibly, job posting.

Union Carbide to institute the following new policies at its Charlotte, North Carolina plant:

(a) An original hire date seniority system that would apply to *all* male and female employees even though there was no showing of discrimination against male employees or other identifiable female employees.[5]

(b) A layoff policy which required unlimited "bumping" every time there was a reduction in force or a job rearrangement. There was no distinction made in this layoff policy between skilled and unskilled jobs. Thus, under the court's order an unskilled and untrained janitor with greater seniority could displace a skilled mechanic or millwright with less seniority in order to avoid layoff.

(c) A recall policy which would give preference to laid off employees over active employees with less original hire date seniority.

(d) A vacancy filling procedure based on job posting which provided that vacancies must be filled according to original hire date seniority without any regard whatsoever to an individual's qualifications (vacancies were defined by the court to include jobs vacated by vacation or illness which exceed two weeks). Under this policy, Union Carbide would have been required to offer and perma-

5. During all times relevant to this case, Union Carbide has maintained a company service or plant-wide seniority system which grants seniority credit for all time of active employment. Periods of layoff and other periods of absence are deducted from company service credit. The district court's order would have restored the seniority lost on layoff or other breaks in employment for all employees at the plant even though there was no showing of discrimination against these employees.

nently fill the job of any employee who was temporarily disabled or took a vacation in excess of two weeks.

(e) An absolute quota system for hiring or promotion into supervisory positions whereby all vacancies for supervisory positions had to be filled with qualified females until the percentage of female supervisors approximately equaled the percentage of females in the Charlotte plant on the date this action was filed. This relief was ordered even though the court did not find that Nance was qualified for promotion or had been discriminated against in the selection of supervisors.[6]

(f) Finally, the district court's order required periodic posting on company bulletin boards of seniority rosters and job descriptions for all hourly and supervisory jobs.

In addition to the mandatory portions of the district court's injunction, the court prohibited the Company from further use of its present tests and its policy of classifying jobs as light or heavy jobs (A. 73a-81a).

On appeal, the Fourth Circuit vacated the judgment of the district court upon finding that the relief ordered was not necessary to remedy the discrimination allegedly suffered by the Petitioner. The court further found that the broad injunctive relief ordered by the district court would not be appropriate even in a properly certified class action (A. 18a-20a). After reviewing the record facts and the issues presented on appeal, the court concluded that Nance was only entitled to possible back pay, attor-

6. As noted by the court below, Nance never even claimed to be qualified for supervisory position (A. 13a).

ney's fees, and "an adjustment in her [seniority date] sufficient to remove the adverse effect of any pre-Act discriminatory layoffs" (A. 18).[7]

ARGUMENT

The Petition for Writ of Certiorari in this case presents a question that is so narrow in scope and so confined to a unique set of facts that a decision by this Court could not possibly have general application to future Title VII actions. As argued more fully below, the Petitioner clearly misinterprets the holding of the Fourth Circuit Court of Appeals which is carefully limited to the facts of this case. Thus, there is no broad or important question of federal law presented that warrants review by this Court. Furthermore, the decision of the Fourth Circuit on the class aspects of this case is manifestly correct and, limited as it is to the unique facts of this case, does not create a conflict with the decisions of other courts of appeals. For these reasons, the Respondent respectfully submits that the Petition in this case should be denied.

I.

There Is No Important Question of Federal Law

The Petitioner maintains that this case presents the important federal question of whether the award of "make whole" relief, that is mandated upon a finding of discrimination by Section 706(g) of Title VII[8] and decisions of

7. Union Carbide has petitioned this Court for a Writ of Certiorari to review the holding by the Fourth Circuit in this case that remedial seniority can be granted to eliminate the effects of seniority that was not accrued because of layoffs that occurred prior to the effective date of Title VII. *Union Carbide Corporation* v. *Nance*, Case No. 76-838, filed December 20, 1976.

8. 42 U.S.C. § 2000e-5(g).

this Court,[9] can be circumscribed or limited by Rule 23 of Federal Rules of Civil Procedure (P. 10-14). The Petitioner flatly states that "the decision of the Court of Appeals interposes a general prohibition on the authority of federal courts to award comprehensive and necessary relief to individual victims of employment discrimination". Further, the Petitioner states that "if the decision is correct, no federal court would have the authority to grant effective relief from systematic and institutional employment discrimination unless the case is certified as a class action. . . ." (P. 11). Arguably, such a question and such a holding by the Fourth Circuit would present an important federal question. *It is clear, however, the holding in this case does not raise this question.*

The decision below can be fairly divided into three parts. The first part of the decision deals with the question of "whether this action is to be treated as a class or as an individual action" (A. 2a). After reviewing Nance's express stipulations that this action was not a class action, the Fourth Circuit restated the issue as one carefully limited to the facts of this case. "The issue thus is whether, *in these circumstances, and in the face of two express 'representations' by the plaintiff to the Court that her action was strictly an individual action, and in the absence of any order of any class certification by the Court itself*, this action can fairly be declared a class action in compliance with Rule 23" (emphasis added) (A. 4a). The Fourth Circuit concluded it could not. "*On this record then*, we find no warrant for treating this case as anything more than what the plaintiff herself has designated it, to wit, an individual action limited as it is to plaintiff's individual claim or claims (emphasis added)

9. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405 (1975).

(A. 9a). Thus, the court below made no broad proclamations that could in any way be interpreted to prohibit appropriate relief in Title VII actions not certified as class actions.[10] The court merely held that because this action was not a certified class action, the district court should have limited its consideration to the evidence supporting plaintiff's individual claims of discrimination. Such a holding is entirely consistent with this Court's decision in *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973).

After concluding that this action was not a class action, the Fourth Circuit in the second part of its decision stated that "the real issue in this case is accordingly the validity of plaintiff's individual claim" (A. 9a). The court then considered the merits of three of Nance's "peripheral" claims. First, the court found that the district court erred in enjoining Union Carbide's prior job classification system because "there [is not] the slightest suggestion in the record or reason to believe that there is any threat that such [classifications] abandoned by the defendant in 1969, will be reinstituted" (A. 12a).

Regarding Nance's second claim of sex discrimination in Union Carbide's procedure for selecting supervisors, the Fourth Circuit noted that Nance had offered no proof as to her qualifications for promotion to a supervisory

10. That the court's holding in this case was not meant to limit a district court's discretion in awarding broad injunctive relief in an individual action is amply demonstrated by the Fourth Circuit's recent *en banc* decision in *Roman* v. *ESB, Incorporated*, ... F.2d ....., No. 73-2423 (decided Dec. 28, 1976), where the court indicated it had not yet decided this question:

> [W]e note that the authorities apparently are not uniform as to whether relief may be awarded, in a proper case, absent a class action, which extends beyond those who are plaintiffs in the suit. . . . *We mention this not to express an opinion on the subject, but to indicate the wide range of choices within the reach of the district judge* (emphasis added) (citations omitted).

position. The court found that what proof there was in the record on this issue was offered by the defendant and "consisted of undisputed testimony, concurred in by the plaintiff herself, that the plaintiff was unable to work amicably with her fellow employees and had been embroiled in difficulties with them". On these facts, the court concluded that "this was a perfectly valid reason for not considering plaintiff for a supervisory position" (A. 12a).

The final "peripheral issue" considered by the court below involved a test utilized by Union Carbide since 1970. This test was required for entry into several jobs requiring specialized skills. The Fourth Circuit, relying on this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975),[11] found that since more females than males had passed the test there was no disparate impact and, therefore, no sex discrimination (A. 13a-15a).

One important point should be made concerning the Fourth Circuit's consideration of these "peripheral issues". The Petitioner erroneously argues that:

> The Court of Appeals summarily rejected practically all of Petitioner's claims of employment discrimination for two reasons. First, the court failed to apply the appropriate standing test to the allegations made by Petitioner in charges that she had filed with the EEOC. Secondly, the court focused upon a letter, . . . that the district judge sent to counsel—rather than the charges Petitioner had filed with the EEOC—as the

11. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975), this Court stated that a test can be proved to have a discriminatory effect "only after the complaining party . . . has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that pool of applicants".

basis upon which to determine what claims of Petitioner were entitled to plenary judicial consideration (P. 17).

Petitioner's statement that the Fourth Circuit "summarily rejected practically all" of Petitioner's claims because of a lack of standing and because of reliance on the district court's letters to counsel is simply incorrect. As pointed out above, the court below considered all of Nance's peripheral claims in detail and found them without merit on the record. In fact, the court mentions standing only in dictum and only in connection with her claim of discriminatory promotion policies. And there, the court's ruling is clearly grounded on Nance's lack of qualifications for promotion rather than on a lack of standing (A. 12a-13a). Likewise, the trial court's letters[12] are mentioned in dictum only to show that immediately after the trial "the trial court seemingly regarded [these additional issues] as wanting in substance". However, the Fourth Circuit clearly did not rely on these letters in rejecting Nance's claims. To the contrary, the court carefully reviewed each of these claims and found they lacked merit (A. 10a-15a).

After considering Nance's "peripheral" claims, the Fourth Circuit in the third part of the decision in this case found that Union Carbide's seniority policy perpetuated the effects of alleged discriminatory layoffs that occurred prior to the effective date of Title VII.[13] In order to remedy this alleged discrimination, the court held that "the plaintiff is accordingly entitled to a judgment requiring an adjustment in her 'company service' status sufficient to remove the adverse effect of any pre-Act discriminatory layoffs" (A. 18a). Turning to the broad injunctive relief ordered by the district court, the Fourth Circuit stated that the district court's judgment went far beyond that which would be appropriate in a properly certified class action (A. 19a-20a). On this basis, and on this basis alone, the court vacated the district court's judgment. Contrary to the Petitioner's contention, the Fourth Circuit did not rely on Rule 23 to limit relief that was necessary to remedy the alleged discrimination.[14] At most, therefore, the decision of the court below stands for the sound proposition that a court must tailor its remedy so that it does not exceed that which is required to eliminate the effects of discrimination.

12. The letters referred to are reprinted in the Petition at p. 7, n. 2. These letters should be read in light of the fact that over a year after trial on the merits, the court summarily adopted the proposed findings of fact and conclusions of law as prepared by the plaintiff on *all* issues presented at trial.

13. See n. 7, *supra*.

II.

There Is No Conflict

The Petitioner claims that the decision of the court below conflicts with decisions of other appellate courts which hold that a district court may enjoin an unconstitutional law or regulation or an employment practice which violates Title VII in non-class action cases even though such an injunction incidentally benefits other similarly situated individuals who are not parties to the suit. The fallacy in this argument is readily apparent: It is grounded on the Petitioner's misinterpretation of the holding in this case. Contrary to the contention of Petitioner, the court below did not rule "that an individual plaintiff is not entitled to broad injunctive relief unless class cer-

14. Because the decision of the Fourth Circuit grants relief to the extent "to which plaintiff was properly entitled" (A. 20a), Petitioner's argument that the court below used Rule 23 in derogation of the Rules Enabling Act, 28 U.S.C. § 2072, has no merit.

tification is granted" (P. 16). The Fourth Circuit simply found that, on the facts of this case, Nance had failed to establish that she was *entitled* to broad injunctive relief (i.e., that broad injunctive relief was not necessary to remedy the discrimination found by the district court). Thus, when the cases cited by Petitioner are compared with the narrow holding in this case, it is obvious that there is no conflict.

For example, one line of cases cited by the Petitioner involves actions for declaratory or injunctive relief because of the alleged unconstitutionality of a law or regulation or because an employment practice allegedly violates Title VII.[15] In cases of this nature, it is arguable that the only possible remedy is the abolition of the offending law or practice. In the instant case, however, it is clear that it was not necessary to enjoin any of Union Carbide's employment practices in order to remedy the discrimination allegedly suffered by Nance as an individual. As the court below correctly found, the alleged discrimination suffered by Nance could be adequately remedied by a simple adjustment in her seniority date and an award of back pay (A. 18a-20a).[16]

Likewise, there is no conflict between the holding in this case and the other cases relied on by Petitioner.

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15. See Petition at pp. 14-16 wherein the following cases are cited: *Craft* v. *Memphis Gas, Light & Water Div.*, 534 F.2d 684 (6th Cir. 1976); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Carter* v. *Butz*, 479 F.2d 1084 (3d Cir. 1973), *cert. denied*, 414 U.S. 1094 (1973); *Martinez* v. *Richardson*, 472 F.2d 1121 (10th Cir. 1973); *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972), *vacated and remanded to dismiss as moot*, 409 U.S. 815 (1972).

16. In addition, the district court's injunction against the future use of Respondent's seniority system as it applied to all *male and female employees* was not proper since there was no showing that the seniority system discriminated against other identifiable male or female employees.

In *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971), the court, in an individual Title VII action, held that relief could be extended after judgment on the merits to other similarly situated females. However, the *Sprogis* court recognized that class relief could not be granted in an individual action without complying with the safeguards of Rule 23:

> In affirming the district court's power to consider extending relief beyond the named plaintiff, we express no opinion on the ultimate decision to be reached upon remand. *Whether such relief is appropriate in this case must first be determined by the court below after consideration of the arguments advanced by the parties, including references to the safeguards of Rule* 23. We merely hold today that the court may so proceed (emphasis added). 444 F.2d at 1202.

On remand, the district court considered the propriety of converting the *Sprogis* action into a class action for the purpose of extending relief to other similarly situated females and concluded that Rule 23 prevented such action. *Sprogis* v. *United Air Lines*, 56 F.R.D. 420 (N.D. Ill. 1972). Therefore, the *Sprogis* decision stands for the proposition that, in an appropriate Title VII case, a district court has the power to convert an individual action into a class action after a decision on the merits as long as the court requires adherence to Rule. 23.[17]

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17. The dissent in *Sprogis* argued that "a procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair." 444 F.2d at 1207 (Stevens, J., dissenting). In effect, the *Sprogis* decision resurrects the notion of "one-way intervention" that was laid to rest by the 1966 amendments to Rule 23. *See* Advisory Committee's Note to Rule 23 as revised in 1966, 3B

(Footnote continued on following page)

As noted by the Petitioner, the *Sprogis* decision *apparently* conflicts with the Fifth Circuit's holding in *Danner* v. *Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971). In *Danner*, the Fifth Circuit held that the district court erred when it enjoined the defendant from discriminating against *any* of its female employees in an action brought by a single female employee. Characterizing the relief awarded as "class action relief", the court noted that "class actions are governed by the quite specific requirements of Rule 23". 447 F.2d at 164. The court concluded, "we hold that class action relief must be predicated upon a proper class action complaint satisfying all of the requirements of Rule 23". 447 F.2d at 164, n. 10.

Despite the apparent conflict between the *Sprogis* and *Danner* decisions, these cases can be harmonized. As one commentator put it:

> The Sprogis and Danner cases can be harmonized. Taken together, they indicate that although the court may suggest that relief to a definable class would be appropriate, it cannot simply award a remedy after adjudicating an individual claim. Rather, the district court must require the actual plaintiff or interested persons to demonstrate that it would be appropriate to do so and make certain that all of the prerequisites of Rule 23 have been satisfied. Wright & Miller, *Federal Practice and Procedure*, Civil § 1754 (1972).

(Continued from previous page)

Moore's Federal Practice ¶23.01 [11-3] (1976). *See also, American Pipe & Construction Co.*, 414 U.S. 538 (1974) ("The 1966 amendments [to Rule 23] were designed, in part, specifically to mend this perceived defect [one-way intervention] in the former rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments").

Although there is arguably a conflict between the *Sprogis* holding and the *Danner* holding, a decision in the present case would not resolve any conflict that may exist.[18] Unlike *Sprogis*, neither the plaintiff nor the district court *sua sponte* has ever sought to certify this action as a class action as required by Rule 23(c)(1). Indeed, Nance expressly denied as a matter of record that she sought class certification. For these reasons, the court below had no alternative but to conclude that the present case was an individual action and, as such, confined in scope to the plaintiff's individual claim. Moreover, the court below correctly concluded that there was no reason to drastically overhaul many of Union Carbide's long-standing policies in order to provide an adequate remedy in this case. For these reasons, this case is very distinctly different from the cases relied on by Petitioner in attempting to demonstrate a conflict between circuits. Because this case does not present the issue raised in the cases cited in the Petition to demonstrate a conflict between circuits, the issuance of a Writ of Certiorari in the present case to resolve the conflict that may exist in other circuits would constitute an advisory opinion in contravention of long-standing rules of this Court. *Muskrat* v. *United States*, 219 U.S. 346 (1911).

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18. The Petitioner also cites *Tipler* v. *E. I. du Pont de Nemours & Co.*, 443 F.2d 125, 130 (6th Cir. 1971), as supporting the position that class relief is available in an individual Title VII action. In *Tipler*, the court noted that other black employees might benefit from the broad injunctive relief sought by the plaintiff. However, like *Sprogis* and *Danner*, the Sixth Circuit cautioned that "the District Court should take necessary precautions to protect the interests of the parties who will be affected by the action". *See also, Washington* v. *Safeway Corp.*, 467 F.2d 945, 947 (10th Cir. 1972) (where Rule 23 prerequisites have not been met in individual Title VII action, action should not be treated as a class action).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMPSON, OGLETREE AND DEAKINS

By: J. FRANK OGLETREE, JR.

By: H. LANE DENNARD, JR.

By: STUART M. VAUGHAN, JR.